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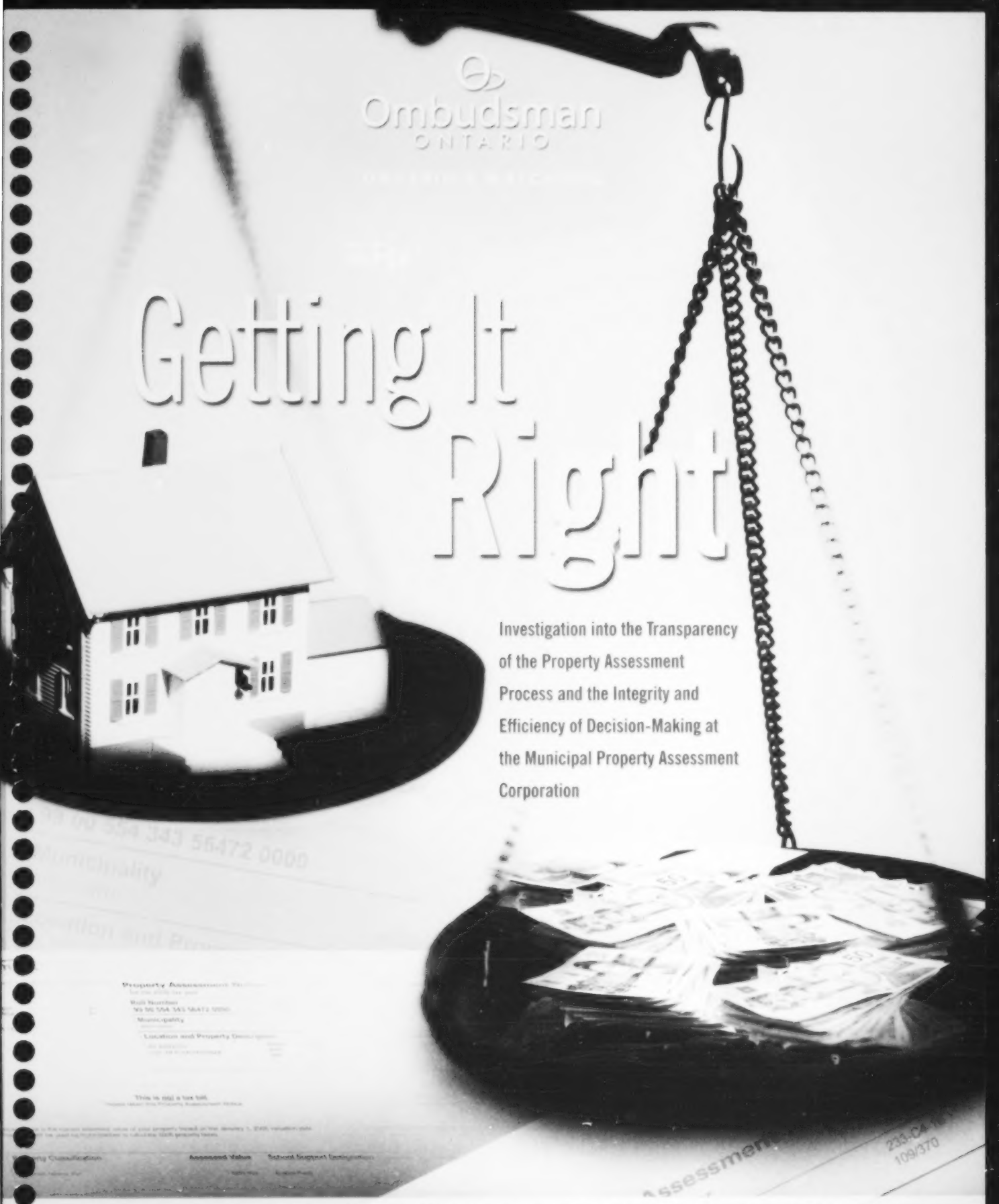
Getting It Right

Investigation into the Transparency of the Property Assessment Process and the Integrity and Efficiency of Decision-Making at the Municipal Property Assessment Corporation



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ONTARIO'S WATCHDOG
CHIEN DE GARDE DE L'ONTARIO

March 27, 2006

The Honourable Michael Brown
Speaker of the Legislative Assembly
Room 180, Legislative Building
Queen's Park
Toronto, ON
M7A 1A2

Dear Mr. Speaker:

Re: Ombudsman Final Report: Getting it Right

I am submitting my Final Report under s. 11 of the *Ombudsman Act*, regarding my investigation into the transparency of the property assessment process and the integrity and efficiency of decision-making at the Municipal Property Assessment Corporation.

I am also submitting the responses to my Report received from the Municipal Property Assessment Corporation and the Minister of Finance.

I am satisfied with the positive commitments made by MPAC and the Minister to consider and implement my recommendations. Accordingly, I request that you lay these documents before the Assembly for its information.

Yours truly,

André Marin
Ombudsman

Enclosures

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Ombudsman Report

Investigation into the Transparency of the Property Assessment Process and the Integrity and Efficiency of Decision-Making at the Municipal Property Assessment Corporation

"Getting It Right"

André Marin
Ombudsman of Ontario
March 28, 2006

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Getting it Right

1 In the words of Benjamin Franklin, "In this world nothing can be said to be certain except death and taxes." Property taxes are indeed a fact of life in Ontario, and have been since 1793, only three years after Franklin died. Even though the obligation to pay property taxes is certain for Ontario property owners, there is actually very little that they find certain about the property assessments that their taxes are based on. Part of the reason is the inherent complexity of tax issues but much of that uncertainty, and much of the frustration Ontario taxpayers feel, has to do with the practices of the Municipal Property Assessment Corporation (MPAC), the non-profit corporation that is responsible for assessments in this province. Consider the saga of John Doe.[1]

2 On June 29, 2001, Doe purchased his Toronto property for $503,000. MPAC determined that on the next day – June 30, 2001, the valuation date for provincial property assessments - Doe's property was worth $617,000. Not believing June 30, 2001 to have been quite so inflationary a day, Doe demanded that MPAC reconsider. He was fortunate. Unlike other similar situations we encountered in our investigation, MPAC reduced his assessment to the actual sale value. But his neighbours in the seven-unit condominium were not so lucky. Doe's purchase price was not accepted by MPAC as marking the value of their similar properties. The neighbours protested, and while three of them managed to settle, three had to spend the considerable time and energy required to appeal to Ontario's Assessment Review Board. Doe represented his neighbours at those appeals. When he tried to obtain full information about how MPAC could have arrived at its assessment so he could respond on their behalf, he felt stymied. MPAC was holding back information. This non-profit corporation, with the power to determine the share of taxes that citizens would pay, was intentionally leaving its processes opaque and mysterious, shrouded in a veil of secrecy. In spite of this Doe won. Not surprisingly, the Assessment Review Board found "that there was no better evidence of current value of a property than actual evidence of what a willing buyer paid to a willing seller for the subject property or comparable properties in the relevant time frame," a position that to this day leaves MPAC unimpressed. Perhaps this is why Doe's saga did not end there. The next year Doe's assessment was back up, and he was back at it. He again persuaded MPAC that this was $80,000 too high. However no one recorded why. As a result, his 2005 assessment was up again, and he was back at it again.

[1] At "Doe's" request, his real name is being kept anonymous, but the case is real.

3 Doe is not the only one to experience a year-in year-out cycle of assessment and reduction after "reconsideration" or "appeal." Nor is he the only one to be denied full access to information about his assessment. Thousands of Ontarians have shared his experiences and many are left angry and distrustful, which is why I have undertaken this investigation. I think there is a crisis of credibility and that much of the distrust is warranted. The credibility of MPAC's evaluation process, already suffering from unexplained discrepancies and from annual revisions, simply cannot be restored without transparent explanation and without MPAC changing key aspects of its corporate culture.

4 I want to say at the outset that MPAC is, in many respects, an impressive corporation performing a massive and challenging task with fewer resources than it should have. I was struck by its ambition to be a leader in the property assessment field, by its rigorous quest for improvement and its consistent attempts at self-appraisal. I was also encouraged by the peer approval it has received from the International Association of Assessing Officers[2] and by its openness to my investigation, an openness demonstrated not only by its expressed willingness to improve but by the proactive steps it has committed to since my investigation was announced. Still, MPAC operates with an exaggerated sense of the quality of its product, an unhealthy commitment to its complex computerized method of mass appraisal, and a habit of secrecy that is too deep to enable public trust. As a result there are a host of problems that I have observed, including:

- MPAC has not made it easy for taxpayers to access the information it is prepared to share;
- MPAC has unwittingly chosen to trade its own credibility for confidentiality, by protecting aspects of its evaluation process;
- MPAC is not concerned enough about problems it has encountered in ensuring the accuracy of its information, the life blood of accurate assessment;
- MPAC believes it knows better than the Assessment Review Board, the statutory body that hears appeals from its decisions, and therefore does not respect adequately the decisions made by that Board;
- MPAC is not as careful about recording information that might benefit the taxpayer as it should be; and

[2] MPAC was awarded the IAAO Distinguished Assessment Jurisdiction Award in 2004.

- At times without apparent appreciation, MPAC enjoys a power imbalance during the appeal process that should be fixed.

5 I am aware that MPAC's own internal, customer satisfaction surveys tend to show well. Frankly, I question those results. Never in the 30-year history of this Office have so many complaints been received in so short a period about a single public agency. Our Office was inundated with protests from disaffected citizens – more than 3,700 of them. Ontarians came, wrote, called and emailed and they were not doing it just because they had a forum for complaining about their taxes. They complained because they see MPAC's assessment practices as fundamentally unfair. I am not persuaded that all of the problems are as deep as some believe, but there are real problems that need attention. Until they are addressed, MPAC will simply not be trusted, and errors will continue.

Background

6 In June 2005 we received information from an individual working within the assessment system that MPAC was failing to consider reductions in property assessments obtained through the Assessment Review Board process. This was not the first complaint about MPAC. Between January and October 2005 we had received 75 of them. The bulk of these complaints claimed that MPAC was failing to take into account in subsequent years reductions in assessments won via the Assessment Review Board or through the "Request for Reconsideration" process. In June 2005 I therefore instructed the Special Ombudsman Response Team (SORT) to conduct a preliminary field investigation to determine whether or not there were sufficient grounds to warrant a full SORT investigation. Two SORT investigators and Senior Counsel were assigned to review this matter. They reviewed complaints, visited MPAC Offices, interviewed MPAC staff and obtained documents from both MPAC and other stakeholders.

7 The preliminary investigation revealed clear reason for a full investigation. The original issue related to the integrity and efficiency of MPAC's decision-making. An additional issue was added, as it had become apparent that property owners felt the system was not transparent and complained they were not made aware of criteria their property assessments were based on. On October 17, 2005 I announced the investigation publicly setting out the issues we were investigating and inviting input from interested parties. As I say, the response was overwhelming. Over the course of the next few months we received 3,720 complaints from property owners concerning MPAC. We also received submissions and offers to provide information from the following groups:

- current and former Assessment Review Board and MPAC employees, and former Ministry of Finance employees;

- interest groups and organizations, including the Ontario Public Service Employees Union (OPSEU), the Ontario Federation of Agriculture (OFA), the Canadian Association For the Fifty Plus (CARP), Waterfront Ratepayers After Fair Taxation (WRAFT), and the Canadian Advocates For Tax Awareness (CAFTA), along with a number of other ratepayers associations, non-profit housing groups, ad hoc residents groups, tenants associations and Business Improvement Associations; and

- property assessment consultants and agents.

8 We also received complaints and submissions from over 104 local, regional and provincial representatives from 83 municipalities, including the mayors of several municipalities. A number of municipalities passed resolutions or submitted petitions supporting our investigation. Seven Members of Provincial Parliament brought forward concerns about this issue to our Office.

9 The President and Chief Administrative Officer of MPAC, Mr. Carl Isenburg, contacted our Office and offered MPAC's complete cooperation. He indicated publicly that, "We welcome the Ombudsman's review."

10 Four SORT investigators were assigned to the investigation and were augmented by other investigators on an as-needed basis during the interview phase of the investigation. The team prepared a detailed investigation plan.

11 The investigative team carefully reviewed each complaint and selected a number of complainants for more detailed interviews. In total, the investigators conducted 62 face-to-face interviews with individual property owners from across Ontario. We interviewed many more by telephone. In all we conducted over 150 interviews.

12 The investigative team also interviewed current and former MPAC employees. Several current employees approached us directly and offered to provide us with information on the understanding that their identities would be kept confidential. We interviewed MPAC senior management, politicians who approached us, as well as representatives of a number of interest groups and organizations. We also interviewed current and former Assessment Review Board employees and former

Ministry of Finance employees. We attended several town hall meetings called to discuss MPAC at various locations across Ontario.

13 Given that the issues we were investigating were not unique to Ontario, we contacted 15 other jurisdictions across North America to determine how they dealt with the provision of information to property owners and the reassessment and appeal process.

14 We obtained and reviewed thousands of pages of documentation from MPAC, property owners, interest groups, property assessment authorities in other jurisdictions and from other sources.

15 This is our Report on what we found. Given widespread confusion about how the tax system works, I will have to begin by setting out the basics.

The Municipal Property Assessment Corporation

16 MPAC does not determine property tax rates or send out tax bills. It is the municipalities who decide how much money they require, and who demand and collect payment of municipal and education taxes.[3] As is true in every other province, in most assessment jurisdictions in the United States, and in many other countries, the total property tax burden is allocated among property owners with each owner paying according to the "market value" of their property. In order to enhance fairness, consistency and transparency of the evaluation process the *Fair Municipal Finance Act, 1997* was passed. It provided that property value assessments across the province were to be updated in 1997 and kept current thereafter. The municipalities use the services of MPAC to do this work. MPAC's primary function[4] is to classify and determine the "current value," as it is called under the *Assessment Act*, of all property in Ontario – more than 4.4 million units, according to the legislation and regulations set by the Government of Ontario. MPAC is therefore an appraisal or assessment body, not a taxing authority.

17 To ensure equality for taxpayers, legislation in Ontario provides for designated valuation dates that apply across the entire province. This means that the value of all properties is to be determined as of the same date. This valuation used to be done every couple of years. June 30, 1999, for example, was the valuation date for identifying the "current value" that was used for the taxation years, 2001 and

[3] Which are collected by Municipalities on behalf of the Province.
[4] MPAC also collects information for provincial jury lists, school support lists and municipal voters' lists.

2002. "Current value" for 2003 was assessed as of June 30, 2001. For 2004 and 2005, "current value" was determined as of June 30, 2003. The Province of Ontario has now decided that there will be a new valuation date each year. From now on, in order to give MPAC time to conduct its evaluations, Ontario property owners will pay taxes according to the "current value" their property held on January 1 of the *prior* year; we are now paying 2006 taxes based on the value our property held on January 1, 2005. MPAC decides how much our properties were worth on that date and provides assessment rolls to the municipalities containing that information.

18 Municipal governments in Ontario have not been doing their own property assessments since 1970, when the assessment process was taken over by the Province. Effective in 1999, the task was assigned to a non-profit corporation, initially the Ontario Property Assessment Corporation (OPAC), which has now become the Municipal Property Assessment Corporation (MPAC). MPAC's Board of Directors is composed of five taxpayers and eight municipal and two provincial representatives, all appointed by the Minister of Finance. It is the largest assessment organization in Canada evaluating more than a $1.1 trillion in property. MPAC now has 1,401 regular and 132 temporary employees, staffing a head office in Pickering Ontario, as well as 33 field offices. In spite of its size, we have received complaints that it is grossly understaffed and records give us reason to believe this is so. In 2005 MPAC had revenues of $153,304,000 and expenses of $158,015,000. Conducting property valuations across Ontario is evidently a massive undertaking.

19 Even with so many employees and such a massive budget, it is not feasible for MPAC, on an annual or even bi-annual basis, to use "traditional appraisal methods in which an appraiser physically inspects properties and relies … on experience and judgment to analyze real estate data and develop an estimate of market value."[5] MPAC therefore uses a combination of evaluation techniques, depending on the nature of the property and the circumstances, but deals primarily in "mass appraisals." More than 85 per cent of the properties in Ontario, including the overwhelming majority of residential properties, are valued using a complex computerized mass appraisal technique called "multiple regression analysis." In simple terms, that process involves identifying a basic market value for properties in a geographical area and then adjusting that value up or down according to the character of the particular property in question to find its "current value." It is important to appreciate that this process does not involve MPAC going into an area and finding specific, similar "comparator" properties and

[5] *Standard on Automated Valuation Models (AVMs)*, International Association of Assessing Officers, September 2003.

tracking their particular sales histories. It relies on models to generate sophisticated market estimates.

20 The complex process MPAC uses requires immense amounts of data, and is updated on an ongoing basis. Relying heavily on Teranet Inc., the corporation that administers Ontario's land transfer tax system, MPAC gets its most important data by tracking all of the sales in the Province and focusing, on a revolving basis, on transactions over the prior 3 years.[6] By examining the value of the transactions as well as other relevant information MPAC identifies geographical areas within the Province that are believed to share the same basic economic influences or property market conditions, which it calls "models." There are currently 131 of these areas identified. MPAC then uses its store of information to break the "models" down to allow for local market variations. In Ottawa, for example, there are 3 market areas with 127 locational neighbourhoods. MPAC establishes a basic market value for property in each relevant zone, which is then "quality checked" and reviewed by staff who are knowledgeable about the area and its real estate market. This is only the start. In order to make specific assessments for particular properties MPAC then identifies the characteristics that might affect the value of property. As might be expected, the primary characteristics contributing to value include property location, lot dimensions, building area, age and quality. Secondary structures like garages and amenities such as fireplaces and air conditioning also contribute to value, while other factors such as proximity to high traffic roadways, industrial property, or wet or marshy areas will negatively affect value. Using the data it has obtained MPAC is able to generate estimates of the impact of dozens of characteristics on a particular market.

21 MPAC, of course, has extensive computer databases that it has developed. It also does its valuations on computer. Based on its judgment about the value-effect of particular characteristics, it has assigned area-dependant values and codes to the information it has stored and uses a statistical software package to create "syntax" – thousands of lines of code that generate an equation - to help determine specific property values. More particularly, when the specific, known information relating to a particular property is input, this program generates an appraisal that purports to be the "current value" of that property.

22 MPAC is proud of its sophisticated appraisal method. By industry standards it is indeed impressive. Still, even using this model, appraisal remains more of an art than a science. While determining market value is accomplished based on evaluating actual past experience, it is in truth sophisticated guess-work or

[6] Where there have not been enough sales in an area MPAC will look back 5 years.

educated prediction. The vagaries inherent in the appraisal process are apparent from the wide margins of error that are considered appropriate within the industry. For mass appraisals the International Association of Assessing Officers (IAAO) accepts a discrepancy of 20 per cent between the median appraised value and actual median sale value; it considers it acceptable if the median sales value in a zone is 10 per cent higher or 10 per cent lower than the median appraised value. When it comes to identifying zones the IAAO is satisfied if the average deviation from the median property value for that zone is less than 15 or 20 per cent, depending on the property type, residential or commercial.[7] To its credit, MPAC imposes tighter standards on itself, targeting deviations of only 5 per cent in either direction.[8] When it comes to determining whether a successful appeal in a particular case demonstrates a failing of its system, however, MPAC accepts a variation of 7.5 per cent plus or minus.[9] The acceptance of these margins of imprecision demonstrates that at one level, MPAC appreciates that its assessment process provides a range of value, rather than a tight result.

23 Still, MPAC seems, based on its own internal assessments, to be exceptionally good by industry standards at predicting median sales. With some exceptions it is achieving median deviations for residential properties measured at only 1 or 2 per cent.[10] However even these estimates of effectiveness are subject to uncertainty; the assessment-to-sales ratios used to study effectiveness are "only a point estimate," with possible sampling errors of as much as 10 per cent.[11] MPAC also acknowledges that the "diversity of the Province of Ontario" poses "limitations and complexities" in model development, leaving almost a quarter of the models studied in a 2005 quality service assessment outside of MPAC's own quality control standards.[12] Then there are inputting errors or property description errors that can result in comparing apples and oranges, something I will say more about below. To show the challenges in getting it absolutely right, MPAC has identified the acceptable level of accuracy in keying Land Transfer Tax Statements[13] and in identifying property characteristics such as measuring square footage[14] at 95 per cent, meaning that errors in 5 per cent of property records is an acceptable level. Again, not to take away from MPAC's overall performance relative to industry

[7] Assessment Roll Quality, August 1, 2005, internal MPAC document.
[8] MPAC, FACTS, Quality of the Assessment Update, August 2005.
[9] MPAC, 2004 Service Delivery Year-end Key Performance Indicator Results.
[10] MPAC, FACTS, Quality of the Assessment Update, August 2005.
[11] MPAC, Quality Services – Post Project Review of Quality Assurance in Residential Multiple Regression Analysis for the 2005 Base Year Reassessment, October 4, 2005 at 3.
[12] MPAC, Quality Services – Post Project Review of Quality Assurance in Residential Multiple Regression Analysis for the 2005 Base Year Reassessment, October 4, 2005 at 5.
[13] Quality Services,: Milner Facility Final Report, February 2005 at 3.
[14] Overview, 2005 Quality Specialist Audit, p.5

standards, it is apparent that the business it is in – appraisal – and the mass appraisal multiple regression analysis it uses, are far from infallible.

The Essential Reconsideration and Appeal Process

24 Given the vagaries of market value assessment, provision is made for property owners to review their property assessments. The simplest method of review is to ask MPAC to reconsider, as John Doe did in the sample case I featured in the introduction. All the taxpayer need do to spark reconsideration is to forward a "Request for Reconsideration" in writing asking that MPAC rethink its position and stating why the taxpayer believes the initial decision is wrong.

25 In addition to, or as an alternative to forwarding a Request for Reconsideration to MPAC, the taxpayer (or anyone else for that matter) can appeal MPAC's assessment decision to the independent administrative tribunal introduced above, the Assessment Review Board. The ARB is an independent body operating under the Ministry of the Attorney General. It is a significant tribunal, having 69 members and 75 support staff as of the end of 2004-2005, and a budget of some $7,500,000.

26 Both the Request for Reconsideration and the ARB appeals form an important and heavily used part of the assessment process. In its 2004 Annual Report MPAC disclosed that there were 164,221 formal Requests for Reconsideration, meaning that close to 4 per cent of all evaluations resulted in demands for revision. Although 2005 was not an assessment year, MPAC still received 27,715 such requests, and as of January 13, 2006 it had received 68,351 requests for the 2006 tax year. As for complaints to the ARB, there were 45,885 of them in 2004. Together assessment reductions following appeals and Requests for Reconsideration totaled $5.4 billion in reduced assessment, $3.53 billion in Requests for Reconsideration alone.

27 One of the things to jump out when the ARB appeal process is examined is that it uses an entirely different technique for assessing current value than MPAC typically employs. As indicated, MPAC relies heavily on mass appraisal using its computerized multiple regression analysis, but when the ARB determines whether MPAC's assessment can stand it does not even consider whether MPAC's computerized mass appraisal, multiple regression analysis calculations have been done correctly. Nor does it examine whether the process works. It does not examine the accuracy of the zones or neighbourhoods that have been identified, or the correctness of median values, or the accuracy of the factors influencing

market price, or the values assigned to them. Nor does it require proof that the syntax formula is valid. Instead the ARB does an individual rather than mass assessment. It either compares the property assessments for the subject property with other comparable properties identified by the parties, or looks at other evidence establishing the *specific* market value of the subject property such as the sales history of *that* property or other *comparable* properties, including factors related to the property that might reduce or increase its value – like disrepair, or proximity to a roadway or the quintessential example, being next to a pig farm. In short, whereas MPAC tends to use mass appraisal techniques, the ARB focuses intently on particularized data. Quite simply, the ARB appeal operates as a different form of assessment than the one appealed from, employing different criteria. This has created something of a cultural gap between MPAC and the ARB, which has caused some of the problems I address below.

Making the Unclear Clearer: How much Information is Enough Information?

28 The key method in gaining trust is to be up front and clear. Meanwhile, the best way to improve a system is to have a look inside. One of the most disturbing things we learned during our investigation was that Ontarians do not believe or trust MPAC, because it is, in their view, a closed and mysterious thing having tremendous power over them. We heard a litany of complaints from thousands of citizens regarding the difficulty they had accessing information about their assessment, and in understanding the information they did obtain. When learning this, MPAC emphasized that it is now providing more information than it ever has. It has also hired a new Vice President of Customer Relations and has attended over 600 community events and visited editorial boards to get its message out. Finally, it is in the process of revising its protocol to improve access to information. These are laudable initiatives, but real access to information problems remain, problems that have done as much to undermine the confidence of Ontarians in the assessment process as any of the other problems I have identified.

29 There are essentially three categories of information that merit discussion both in terms of mode and breadth of access, namely, (1) information about the subject property, (2) information useful in appeals before the ARB, and (3) information about the mass appraisal system used by MPAC.

(1) Learning about the Subject Property

30 The Assessment Notices that taxpayers receive from MPAC contain only limited material information about the taxpayer's own property; the Notices describe the previous assessed value that is used to calculate the prior year's taxes and the percentage increase in the property value since the last assessment but do not disclose the information MPAC used to assess that value. This information is critically important for the obvious reason that if MPAC's information about the property is wrong, it will be comparing apples and oranges when estimating the property's value. Even if the "mass appraisal" model was impeccable, a taxpayer's assessment would be wrong if MPAC had material information about the subject property wrong. We encountered many cases in our investigation where MPAC was proceeding on inaccurate subject-property information. Robert and Sheila Kosowan's property was over-assessed in part because their two-bedroom home was listed as a three-bedroom home. Robert Fortier could not understand his assessments, which he appealed successfully three times, until he learned that MPAC had the square footage wrong. Walter Rudnicki had a single car garage, not a two car garage. These anecdotal illustrations are not rare aberrations. As I will discuss below, MPAC's own quality assurance reviews disclosed significant problems in capturing accurate data about a premises, with error rates as high as 50 per cent of properties in some cases.

31 Fortunately, the information about their properties that taxpayers require to verify their assessments is available. MPAC's Guidelines for the Release of Assessment Data state that every property owner has the right to know what factual information MPAC has about their property. Larry Hummel, the Vice President, Property Values at MPAC noted that there are 200-300 data elements relating to each property, and that if property owners request that information, MPAC would be obliged to provide it at no charge. The problem is that most property owners have no idea that MPAC even has this information, or that it is important to the assessment made, let alone how to access it. The "Important Information about Your 2005 Property Assessment Notice" brochure that is sent out with the assessments simply notifies taxpayers that they can "access assessment roll information and assessment roll values for [their] property." It does not explain what precise information is available or why it might be worth looking at.

32 It is possible for those in the know to request the relevant information by phone, mail or email but MPAC relies heavily on its website, which contains a section entitled "About My Property," to communicate this information. For privacy reasons, property owners must first register by phone with MPAC to access information through this site. Once registered, a property owner can enter their

address or assessment roll number and obtain a Property Profile Report. This report contains detailed information for a single residential or farm property including address, legal description, "current value" assessment, site information, recent sales information, and structural information, but does not come close to furnishing information on all relevant characteristics. Many of the cases we encountered involved circumstances in which errors in assessment resulted from the fact that MPAC's information about a property was wrongly recorded. If MPAC were to send out the relevant Property Profile Report, that is currently available through About My Property, as a matter of course with its property assessments, property owners would be able to quickly identify errors in MPAC's data, and would have a better general understanding of the basis on which their property was assessed.

33 Mr. Hummel acknowledged that it would be a good idea to have a catalogue of the data that it holds on the website. I would go further. I am going to recommend that the Assessment Notices include a Property Profile Report and that the accompanying brochure describe the importance of ensuring that MPAC has accurate information about a taxpayer's property, and describe exactly how all of MPAC's information about the subject property can be accessed and checked, including alternatives to the Internet. **(recommendations 5 and 1)**

(2) Learning About Comparable Property Assessments

34 One of the most common ways to appeal an assessment to the ARB is for a taxpayer to show that their property is overvalued relative to comparable properties or "comparators." Naturally the Assessment Notice provides only limited relevant information about relative assessment rates; it describes only the average percentage increase and decrease in residential property assessments for the municipality at the time the Notice was printed. This may serve as a red flag for taxpayers but it is a blunt tool, particularly given that the Notice does not give the average increase in the particular neighbourhood zone the property falls within. This is an omission that I am recommending be corrected. **(recommendation 2)**

35 For multi-residential properties or apartments MPAC has developed a prehearing process in which they send out in advance of any request detailed evaluation summaries for every multi-residential property in the province to all property owners. This practice, which is about to be extended to commercial properties, is done because it is efficient; the information is on a single database making it easy to organize. Moreover, for business reasons there are a high percentage of challenges by multi-residential and commercial property owners. This pre-

hearing disclosure may forestall many appeals by demonstrating the appropriateness of the assessment, and will invariably save owners from having to hire tax agents to conduct this research. For reasons of volume MPAC does not provide this kind of global disclosure to residential owners. Instead, on request, residential property owners can obtain, free of charge, varying degrees of information on up to 24 other properties for comparison purposes. In a November 30, 2005 letter from Carl Isenburg to a property owners association he explained that the number 24 was chosen by MPAC because it was considered sufficient to determine whether a property was fairly assessed. If taxpayers want more comparables, they can get them at $20.00 each, or conduct their own search of municipal assessment rolls.

36 It struck me as I learned about its disclosure practices that MPAC has not made it easy to access the relevant information. These 24 property disclosures are in fact furnished in waves, and only on special request. The brochure sent out with the Assessment Notice is unintentionally misleading. It advises taxpayers that they can access up to 12 comparable properties of their choice, failing to mention the other 12. The information that is ultimately furnished is also inadequate. While it describes where to send the request for the initial 12 it does not explain why a taxpayer might want this information or what precise information will be furnished or exactly how to secure it.

37 What taxpayers receive at this initial stage is up to six "Assessment Look-Up Reports" and six "Detailed Property Reports." As the name suggests, the "Assessment Look-Up Reports" contain only summary information from the assessment roll, including current assessed value and property dimensions and some MPAC coding information. The "Detailed Property Reports" include the same information but add a more precise property category description and a selection of nine structural details including square footage, number of bedrooms, finished basement area, and "heat type." Notably, neither the "Assessment Look-Up Reports" nor the "Detailed Property Reports" include all of the features that may affect the value of properties.

38 It is by writing MPAC or visiting an MPAC local field office[15] that a property owner can obtain Detailed Property Reports on up to six *more* properties. In addition, a Property Report containing up to six comparable properties chosen by MPAC can be requested. These last six comparables are of tremendous importance for in the ordinary case they are the examples MPAC relies on to try and defend the assessment in the event of an ARB appeal.

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[15] Proposal for the Release of MRA Related Data, November 17, 2005.

39 As indicated, property owners can also access additional information from MPAC at a cost. Property Line, MPAC's on-line site, allows individuals to purchase assessment, site, structural, and sales information on all properties across Ontario. Anyone can use Property Line through a subscription or pay for the service by credit card. For instance, for $20.00 per property a property owner can get assessment information for similar properties. Each report includes the address, roll number, current value assessment, recent sale, and site information for a property, but not all of the information relevant to assessments.

40 A taxpayer might also want to assess the general municipal assessment rolls, which contain basic tax information. These are available for researching, free of charge, at local municipal offices during regular business hours. Access to these rolls is secured by subsection 39(1) of the *Assessment Act*. Even though MPAC has this same information on its computer files it will not share it directly with taxpayers or make it available through its website, nor will it share its other general data, such as its sales enquiry screens. MPAC does not furnish this general information in part because of confidentiality undertakings it has had to furnish to Teranet Inc, the private company that administers the collection of land transfer taxes for the Province of Ontario mentioned above. As part of its arrangements with Teranet the Province has granted Teranet an exclusive world-wide licence to market this data. Startlingly, MPAC therefore has to secure this information, essential to its ability to prepare its assessments, by agreeing to sub-licence it from Teranet. Under relevant agreements to which the Ministry of Government Services and the Ministry of Finance are also parties, MPAC receives the right to use this information but only to provide "statutory products" it is required by law to supply – such as assessment rolls to municipalities- or for its own commercial products agreed to by Teranet. MPAC has undertaken expressly that this information will not be made generally available to the public or distributed unless required by law. Not only will MPAC not furnish its assessment rolls, it has taken the position that those municipalities that make them available on their websites are in violation of the sub-licence agreements they have entered into with MPAC. As a result, a number of municipalities no longer make assessment roll information available to the public electronically.

41 There are also privacy concerns and access to information limitations that MPAC relies upon. From an access perspective, since the relevant information is available elsewhere – in registry offices and in municipal offices – MPAC is not statutorily required to furnish it. The Information and Privacy Commissioner upheld MPAC's refusal to display a sales enquiry screen relating to 1,929 sales in a particular neighbourhood on this basis. In *Municipal Property Assessment Corporation v Mitchinson, Assistant Information and Privacy Commissioner et al.* (2004), 71 O.R. (3d) 303, the Divisional Court upheld MPAC's refusal to furnish

assessment roll information to a collection agency that wanted to use it to find *judgment debtors, in part* because the information was otherwise available. From a privacy perspective, the assessment roll also contained personal information that can be disclosed only on consent or as authorized by law. The Court found that the *Assessment Act* neither obligates nor authorizes MPAC to do anything with the information other than to make it available to a municipal clerk.

42 Without question, the interaction between the licencing agreement, the *Assessment Act* and *Municipal Freedom of Information and Protection of Privacy Act* serves to restrict public access to assessment information. While the assessment roll information is available, it is not readily available. Property owners who try to use the municipal property assessment rolls have to undertake the process of searching them manually. As this investigation does not concern the Province's wisdom in giving Teranet Inc. an exclusive right to market data that is also required for MPAC to meet its statutory assessment mandate I will not address the issue other than to make the obvious observation that a byproduct of this arrangement is that customer service is sacrificed in a system in which a private player has a substantial financial stake.

43 It is evident that access to comparables is critical. While MPAC's decision to furnish 24 free comparables and to charge for the balance is adequate, access to this information has to be improved. I am recommending that the brochure MPAC furnishes with its Assessment Notices spell out how comparables can be useful on appeal and furnish accurate information as to exactly how they can be accessed. **(recommendation 3)** MPAC should advise that the six comparables it selects are likely to be relied upon by MPAC in the event an appeal is undertaken. Finally, I am recommending that the information furnished on each of the comparables include all data relevant in the evaluation of property. **(recommendation 6)**

(3) Learning about MPAC's Mass Appraisal System

44 Until recently, MPAC only made the disclosure described above. Other than outlining the appraisal technique in general terms, MPAC furnished none of the specific information that it uses to define a market model or neighbourhood or to establish market values within it. Nor did it disclose the multiple regression factors it uses to influence the value of specific properties or its opinion on the value of those factors. Nor would it disclose its "syntax" equation. The primary reason given was simple. MPAC organized and evaluated the information it uses for mass appraisal, and it developed the syntax model. It considers these things to be intellectual capital or proprietary information that it is not obliged or willing to

share. A secondary reason occasionally offered to resist disclosure is to plead concern that Teranet Inc. might sue if MPAC makes too much disclosure, a position that seems inconsistent with its pre-hearing disclosure practices in the case of multi-residential and commercial properties.

45 MPAC's primary, "intellectual capital" position is not without merit. Even though it is a non-profit corporation whose mission is to deliver timely, cost-effective, objective and accurate property valuations, MPAC does more than simply prepare assessment rolls. It has "products" to sell. In particular, it markets information to the financial services industry, which is used in the industry for underwriting purposes. In fact, MPAC brings in approximately $4.7 million annually in this way and believes the market is large and growing. To be clear, even when selling "products" MPAC remains a non-profit corporation, albeit one that in its own vision statement is "infused with a spirit of entrepreneurship." This is because MPAC does not keep the money it earns nor does it distribute the money to shareholders. It uses the income its products bring in to defray the costs of preparing assessment and other information for the municipalities. MPAC is fearful that if it releases data from, or information about, its multiple regression analysis competitors will emerge and replicate its results, thereby depriving MPAC of this revenue stream. MPAC is intent on protecting its market.

46 Even though MPAC's market enterprise saves taxpayers money, it is evident that there is a clash between MPAC's primary public assessment function and this side-line business. Lewis Auerbach, a former director in the Office of the Auditor General and former member of the City of Ottawa's Task Force on Property Assessment and Property Tax Issues, certainly had problems with it. Not surprisingly, he found MPAC's system to be complex and obscure when he felt it should be transparent and clear. When he was trying to unpack it with other former members of the Task Force he was told that MPAC had to keep the details of its assessment model secret because of its commercial value. MPAC was prepared to share some of the information with him provided he would have it for only two weeks and sign an agreement not to share it with anyone else. Such an undertaking would have prevented him from obtaining the advice of a professor of statistics and sharing it with others who had been on the Task Force, so Mr. Auerbach declined. His experience left Mr. Auerbach wondering what a public agency was doing sheltering information from the public for mercenary objectives.

47 Whatever merit it may have, in the past MPAC was overplaying its trade secret hand. While MPAC has managed to convince the Information and Privacy Commissioner that disclosure of certain information would result in reasonable expectation of financial harm, the Information and Privacy Commissioner found

(in decision MO-1564) that there was a superior competing compelling public interest in providing taxpayers with some of the basic information about how their taxes are calculated, including what factors (variables) are considered (and which ones are not) and the weight given to those variables (the coefficients). As a result, this information is now made available, but not the underlying information used to weight the variables, or the syntax. The increase in access to information about the multiple regression appraisal technique is a largely pyrrhic victory for taxpayers since one needs the syntax to run the equation, and more data to make it work.

48 In an effort to comply with the Information and Privacy Commissioner's compromise orders (including MO-1600-R), MPAC created a package for release to the public, called the Market Model Report. When John Doe asked for information about the assessment model he received a letter telling him that MPAC's Market Model Report was available through the Freedom of Information Office. The letter continued:

> The Market Model Overview report provides a summary of the market areas that exist in the assessment region; a sales database summary; a list of coefficients and variables used to value properties within the market area; assessment-to-sale ratio analysis results as an indication of quality; and a list of the property information collected for analysis along with their definitions. Due to the detailed nature of the information and the time it takes to prepare this package, the cost of the report is $300.00 plus applicable taxes.

49 The Report now costs $250. Since, as a general rule, assessments have to be off by $25,000 to generate that much in tax savings, the cost of this information remains prohibitive. Because of their cost and limited utility for appeal purposes, and the lack of public knowledge about their existence, only 10 reports have been sold.

50 In addition to the Market Report, MPAC is prepared to share a screen print of its "Valuation Details Enquiry (VDE) Screen" from its mainframe. This screen lists the variables and derived values for each variable used in the Multiple Regression Analysis calculation for a property, but not how those values were derived. According to MPAC's records, however, there is confusion among MPAC staff about whether they are permitted to share this information with property owners.

51 In my view, MPAC's current practices relating to the disclosure of its appraisal methods are too restrictive. Access to information about the operation of those methods not only remains limited, almost to the point of functional irrelevance, it

is expensive and MPAC staff are not always clear on what can be disclosed. Moreover, the information that is supplied is far from reader friendly. Codes have to be cross-referenced on different documents, all to get an incomplete picture.

52 To its credit, MPAC has already begun the process of improving disclosure, an undertaking that took on new urgency when this investigation was announced. Most notably, five MPAC Senior Managers recently prepared a document entitled Proposal for Release of MRA [Multiple Regression Analysis] Related Data, dated November 17, 2005, which makes the following recommendations:

- a memo be sent immediately to all staff reinforcing that a copy of the Valuation Details Enquiry screen should be offered to property owners seeking to better understand how their Current Value Assessment was determined.

- a new screen be developed, combining the plain language of the Valuation Details Enquiry screen with the numerical information of the Multiple Regression Analysis (MRA) Current Calculation Details Enquiry screen, which contains the coefficients (the property characteristics and value adjustments) to be offered to property owners seeking to better understand how their assessment was determined. The information would be made available for the owner's property and six comparable properties at no charge through "About My Property".

- a sample Market Model Report be placed on the MPAC website with explanatory notes and information on how to purchase the report.

- a list of all data elements on the MPAC database be available on the website.

- information regarding quality class, character of construction etc., used in the determination of the current value assessment be placed on the website [and]

- post aggregate sales and Current Value Assessment information by municipality, including ratio studies and average Current Value Assessment be placed on the website.

53 MPAC's Executive Management was scheduled to meet to consider this Proposal in January.

54 Notwithstanding all of the reasons for maintaining secrecy I nonetheless believe that MPAC's disclosure policies will not be optimal, even if this policy is adopted. I am mindful that MPAC is not using its intellectual property to profit in any crass commercial sense and I am respectful of the Information and Privacy Commissioner's acceptance that the business undertakings of MPAC could indeed be damaged by disclosure of full information. I am also aware that the mass appraisal information is not of marked utility in appeals before the ARB, given the criteria the ARB focuses on. Yet there are two significant considerations that support full disclosure.

55 The first is the public interest in access to information. Although it is a non-profit corporation, MPAC performs a governmental function that has serious implications for Ontarians. The ability to generate change, if required, depends on access to information. Altogether apart from appeals, one of the important checks on the assessment system is that the property owners are given the right to challenge assessments and this right should extend to challenging the general manner in which assessments are carried out. This right cannot be exercised effectively unless property owners have sufficient information. Even if most individual taxpayers cannot usefully employ that information, taxpayer associations and public policy critics can. Reliance on commercial secrecy by MPAC requires Ontarians to accept "trust me" answers and to rely on the integrity and accuracy of MPAC's own self-appraisals. If "trust me" was an adequate answer for public processes we would not have freedom of information legislation. It is important to appreciate that the Information and Privacy Commissioner was not saying that it would be a bad idea to give the public this information when rendering relevant decisions. The Commissioner was simply interpreting the legislation as it currently exists.

56 In addition to the importance of access to material information about why the government assesses the property of its citizens the way it does there is a burning need for confidence in the process, and confidence requires transparency. One of the Assessment Review Board members we spoke to suggested that the lack of full disclosure is the underlying cause of problems for some homeowners. He said that without the ability to see what elements contribute to the current value assessment, the homeowner is left suspicious. This ARB member is right. In the words of frustrated taxpayer Douglas Reid from Lyndhurst Ontario, "the claim of proprietariness is to me essentially the last refuge of someone with something to hide." Mr. Auerbach's Ottawa Task Force, fully mindful of the commercial ambitions of MPAC, recommended that it "make the methods, parameters and technology upon which it calculates property assessment open, accessible and transparent." When canvassing other jurisdictions, our investigators were advised

by a City Assessor for the City of Regina that it does not sell any of its data, and that its priority is to get the assessments right. He noted:

> Perception needs to be acknowledged as being critical in the measurement of assessment services. Provision of information to property owners that allows self-examination is the best way to increase public trust and understanding. When the results can be examined by the customer and they can come to their own conclusion that it appears to be assessed fairly and correctly they then may move to a position of not liking the tax result but being satisfied that the assessment process was applied fairly.
>
> There is no expectation for our Assessment Services to raise revenue.... The way I view this is that there is a cost to natural justice and this relates to the issue of how to fund the level of assessment services that provides people what they need to satisfy their right to ensure they are being treated fairly.

57 I am strongly inclined to this view. The cost of credibility of MPAC's assessment process, an issue that has caused tremendous rancour and stress for Ontarians, may well be the need to run the risks of impairing its market side-line practices. Frankly, I wonder whether the business risks identified by MPAC are not exaggerated. Trade secrets are only one market factor. Efficiency is another and MPAC's infrastructure is already funded at taxpayer expense, an advantage competitors would not have.

58 I understand that this is a complicated question of public policy, and I am chary of being too bold. I am therefore attracted to the position of Marcel Beaubien, Member of Provincial Parliament, who conducted a review of the assessment process for the Ministry of Finance. In a report released in the Fall of 2002 he recommended an open exchange of information between MPAC and the public and that careful consideration be given to an appropriate balance. I am therefore recommending that the Government of Ontario undertake an active review of the matter, with public consultation so that a balance acceptable to the people of Ontario can be achieved. (**recommendation 8**) MPAC believes it has already accomplished this. Noting that there are jurisdictions with complete disclosure, as in Florida, and others with less disclosure than MPAC furnishes, Mr. Hummel said, "we thought we'd hit a balance." As I say, I am not so sure. What I am sure of is that if Mr. Hummel is right, MPAC will have a persuasive case for maintaining the status quo and keeping its books closed to the taxpayers it assesses. If he is wrong, then better access will result. In the meantime, I am recommending that MPAC adopt and implement the Proposal for Release of MRA [Multiple Regression Analysis] Related Data that it prepared on November 17, 2005. (**recommendation 7**)

59 I am also recommending that MPAC publish its administrative procedures regarding assessments and inspections, disclosure of information, requests for reconsiderations and ARB appeals in writing and make these available to the public on its website. These procedures should include those administrative procedures incorporating the recommendations set out in this report. **(recommendation 9)** This will inject a greater degree of transparency into the process and assist taxpayers in gaining a better understanding of how their assessments, requests for information and objections are dealt with by MPAC. It should correspondingly, also assist in restoring, in part, public confidence in MPAC's handling of assessments and complaints.

Trying to Get Through to the Source

60 It is obvious that where it is appropriate to share information, taxpayers require effective access to it. They also require the fullest explanation possible for their property assessments. There are troubling signs that this is not happening when phone contact is made with MPAC. Many complainants told us about their frustrating experiences trying to get hold of someone at an MPAC regional office who actually knew something about their specific assessments. We heard from property owners who said that MPAC's Customer Contact Centre staff are either not very knowledgeable or refuse to provide a telephone number for a regional office. It turns out that MPAC has an express policy of discouraging contact with regional office personnel. In the interests of efficiency, MPAC has set an artificial target that no more than 30 per cent of calls should be forwarded to the relevant field office. MPAC has bettered that by half. Its phone blockade is applied so rigorously that only 15 per cent of enquiries were forwarded to field offices during this period.

61 It is true that MPAC experiences significant public contact and that this creates tremendous resource pressures. Its records show that between September 15 and November 30, 2005, the Customer Contact Centre processed 204,699 enquiries, of which 151,902 were telephone enquiries. This call volume is doubtlessly attributable in large measure to the kind of distrust and dissatisfaction that past practices have engendered, and I suspect it could be partially ameliorated with greater openness and effectiveness of communication. It is possible that the call blockade itself is likely making things worse. When taxpayers hit this kind of wall in getting answers, it is little wonder they suspect that MPAC is hiding something. Handle a call right the first time and call volume is apt to decline. Even if that were not so, these callers are taxpayers who have problems. Andrew

Notaran of Toronto, for example, has been on a six year roller coaster of assessments and reassessments and has spent an inordinate amount of time trying to access people with authority and information. He has routinely been told that MPAC's Customer Contact Centre will not give out regional numbers and he is routinely told to address his letters, "To Whom it May Concern." The priority should be on customer service, not artificial efficiency goals. MPAC's phone practices cry out for reevaluation. I will therefore be recommending that MPAC review its current Customer Contact Centre practices with a view to improving public access to points of contact capable of furnishing relevant information. **(recommendation 10)**

Getting it Wrong

62 In media releases, town hall meetings, and other communications MPAC emphasizes the accuracy of its assessments. In Mr. Isenburg's October 18, 2005 press statement he quoted the acknowledgment contained in MPAC's brochure, "Important information about your 2005 Property Assessment Notice" by declaring that "Accurate assessments are the cornerstone of the property tax system." It is obvious that this is right. Equally obvious is that the key to accurate assessment is accurate information. The multiple regression analysis model zones are only as good as the information they are based on. The basic market values are only as good as the sales information. The values affecting property are only as good as their informational foundation. And the application of the model to specific properties is only as good as the information about those properties. I am disappointed to say that our investigation revealed troubling evidence about the accuracy of MPAC's information. This evidence was not difficult to find. We did not rely only on anecdotal illustrations of errors communicated by disgruntled taxpayers, although we uncovered an uncomfortable number. The proof was in MPAC's own internal assessments.

63 First, there appear to be problems with the general data used to identify models and values. In 2003 MPAC produced a draft report entitled, 2003 Assessment Update Post Project Review setting out the results of a "high level review of the fourth province-wide assessment update." The review's Executive Summary notes many problems with values "rooted in the fact that data is incorrect or missing." In a number of specific areas, the report noted that values were suspect and that properties had therefore received incorrect values. MPAC also produced a report dated October 4, 2005 entitled Post Project Review of Quality Assurance in Residential Multiple Regression Analysis for the 2005 Base Year Reassessment, which addressed the Residential Multiple Regression Analysis for

the 2005 base year reassessment. This review leaves a shadow over the integrity of the models that had been developed. It found that 7 of 29 or 24 per cent of the models reviewed did not meet at least one of MPAC's Corporate Quality Standards. The majority of discrepancies identified were due to keying errors that produced incorrect coefficient values, which in turn, led to incorrect Ontario Assessment System generated values. The review also referred to inequities between regions, resulting from failure to use a consistent valuation strategy.

64 Much of the problem stems from inaccurate information about specific properties that MPAC uses. Naturally, MPAC relies heavily on inspection to collect accurate information. It calls inspection "the foundation upon which the current value assessments and subsequent property taxes are based." Sadly, MPAC has not been adept at inspection. We are aware that there are tremendous pressures on inspectors because of staffing shortages and have been advised that in some cases assessors are expected at times to make decisions about the integrity of sales from their desks because demands on staff make physical inspection functionally impossible. Even where inspections are done, though, errors occur.

65 A 2003 review of the data obtained by field inspectors found that the procedures used by property inspectors when inspecting properties subject to building permits were outdated or incomplete. Appropriately MPAC changed its procedures. When Quality Specialists audited 1061 properties in 21 of MPAC's 33 field offices in late 2004 and early 2005 they found that conflicting procedures were still being used, and that not all staff had been trained in the new protocol. Their review noted that many property inspectors were not updating all changes to a property as required by MPAC policy but were only identifying those changes relating to the building permit. There was missing data, pertinent information not collected, and structures that were not assessed. In one office, 18 of 23 inspections for renovations failed to pick up other pertinent site or structure information. There were also problems with measurement. Even though MPAC procedures require property inspectors to physically measure any new structures and to visually confirm the measurements of existing structures, the review found that there were area calculation errors in a significant number of properties caused by applying the incorrect model home area, not noticing that the model home had been customized, or by the inspector simply not measuring correctly. It was noted that errors in measurements were often compounded by the fact that the inspector had no diagrams, sketches or pictures to refer to regarding recent changes to the property and the inspector had to re-measure the structure in order to make an accurate determination of whether any changes in area had occurred. In addition, the review found that not all inspectors updated the notepad and inspection screens on the computer system. In one field office there were 28 instances when the inspection information was not updated. In terms of quality

assurance, MPAC was also failing in the field. The review found that some offices were not doing process controls in the field or at all to ensure that procedures were being followed consistently.

66 When our investigators set out to analyze the audit results in more detail we found that different regions reported information differently. Some spoke of total number of "non-conformities" [a euphemism for errors], others of number of properties with non-conformities, others of number of non-conformities affecting value, and others of number of properties where value was affected. This made it difficult to correlate results and should be fixed in the future, a point I am taking up in my recommendations. (**recommendation 12**) What was nonetheless obvious was that the audits revealed an astounding degree of inaccuracy:

- Based on the 21 field offices that reported on the number of properties with non-conformities, there were errors relating to almost half of the properties inspected: 414 properties were identified with non-conformities out of a sample size of 951.

- The number of non-conformities affecting assessment value was almost two thirds: 198 properties were identified in this category in a sample of 337 properties that were audited using this reporting criterion.

- The number of properties that had their value affected by an identified non-conformity was over a third: 119 properties out of a sample of 318 properties that were audited using these reporting criteria.

67 The full results are reported in a chart at Appendix 1. To illustrate the nature and number of errors more particularly, the following sample will suffice.

68 **Field Offices 28, 29, 30**

- In one case, a 48 per cent variance in the second floor area of a property was identified. MPAC had recorded the square footage as 704 sq feet while the actual square footage was 336 sq feet.

- An allowance for an unfinished area had been removed, even though the area remained 20 per cent unfinished.

69 Field Offices 18, 19, and 20

- MPAC had only recorded that one house backing onto highway 403 abutted the highway, although all of the odd-numbered houses on the street should have been adjusted similarly.

- A full bathroom was not recorded.

- The quality code of the home was incorrect. Quality is rated on a scale from one to ten, increasing in increments of 0.5. Quality is a critical factor in assessing the value of a property. The higher the quality rating the higher the assessment. According to the audit summary, the quality class of the identified home was listed as a 4.0 when it probably should have been a 6.0.

70 Field Office 13

- The wrong subdivision model had been identified with respect to a property and there were three examples of measurement errors.

- In the case of 16 properties, the square footage was incorrect.

71 Field Office 6

- The value for an Omitted Assessment was listed as $95,000 instead of $60,000. An omitted assessment is an assessment that has not been recorded on the assessment roll. When an omitted assessment is added to the assessment roll, property taxes can be collected for the current year and, if applicable, for any part or all of the previous two years.

72 Field Office 32

- In one example, a garage was demolished and a new garage was constructed in its place. The new garage was assessed according to MPAC's policy, but the old garage had not been removed from its records.

- In another case, a shed had been removed from a property, but MPAC had not updated its records to reflect this.

- MPAC's records on yet another property showed that a shed had been removed, but on inspection, it was discovered the shed was still on-site.

73 **Field Offices 16, 17, 25, 28A.**

- A discrepancy in structure area had resulted in an assessment being increased in error by $118,000.

- A discrepancy in a supplementary assessment resulted in an inappropriate $98,000 decrease in assessment.

- Air conditioning and/or basement walkouts were either missed or added in error in 19 cases.

74 **Field Office 23**

- A number of structural characteristics were not recorded properly including half baths, air conditioning, fireplaces, and garage areas.

- In two cases, MPAC's records failed to identify that properties were abutting commercial and industrial properties.

75 **Field Offices 3, 4**

- MPAC's records wrongly recorded that a property had air conditioning.

76 It reflects well on MPAC that it conducted these reviews. Yet we found that MPAC management was not always as receptive to the recommended changes as we think it should be. While management did call for increased training and greater communication to ensure that everyone was aware of their responsibilities, and while it did promise to follow this audit up, it did not respond with the kind of sense of urgency it should have. It was at times inappropriately defensive. The errors should have galvanized MPAC management to be unequivocal and decisively proactive.

77 Instead, management did not accept the recommendation for use of sketches, stating it was not part of current policy for the normal inspection process, although it did note that it was advantageous in some cases. In terms of the recommendations with respect to process controls it simply disclaimed having the resources to send inspectors into the field as often as desired. What is most worrisome are the suggestions made that downplayed the undeniable fact that there were a shocking number of errors in its data, signaling a troubling systemic problem. Without evidence or an idea of how prevalent the explanation was, management suggested that the failure to collect changes in property information

might be explained on the basis that the changes were made during the "time lag" between the original inspection and the audit. Why assume that or downplay the significance of the findings? It also made a point of noting that in some cases the variables identified as not collected were not significant in the particular field office. The Director Quality Services at MPAC said of the large number of errors that "could affect value" that the key word was "could" and he described the errors as "quite small and insignificant." He said the report was done in a "nit-picky" way to "say tighten up your procedures and training and controls so that you can do a better job in the future." Surprisingly, Mr. Hummel, Vice President, Property Values, who is responsible for implementing audit recommendations, said he did not have a sense of the impact of the audit reports "in a global sense," cautioning that he likes "to see every audit put into context, and that is what is the impact of the values, how can we project it out to the database and that isn't clear from the audits."

78 I am left wondering why MPAC would make a "harmless error" assumption rather than be shocked by high patterns of error into decisive action. There are some within MPAC who, unlike Mr. Hummel, believe they have a sense of the impact. During our investigation we heard from front-line MPAC staff who said "they do not have confidence in the product." I am fully cognizant that Mr. Hummel may be right and the staff wrong but having whistleblowers denigrate their own product is a calculus for concern that cannot be ignored. I am also troubled by the single-minded focus I detected within MPAC of the impact that errors might have on models. This is not just about models. The accuracy of the information recorded about premises matters to the particular assessments made; even if an error does not alter a model it remains that individual taxpayers are being assessed in an uncommon number of cases on the basis of inaccurate information.

79 Quite simply, processes have to be put in place for regular audits, followed up by dedicated education programs, or the taxpayers of Ontario will remain distrustful of MPAC, and with good reason. If the job is being done with a crew too skeletal to do it right, this too should be addressed. MPAC prides itself on producing its assessments at a lower cost than other assessment bodies in Canada. MPAC's staffing decisions should not be about its bottom line. They should be about being right.

80 I am therefore going to recommend that MPAC review whether it is adequately staffed to perform its function appropriately, and if not, what steps can be undertaken to improve things. (**recommendation 11**) I also believe that one of the recommendations I have already described - for improved communication by MPAC to property owners of the particular information MPAC is relying upon in

assessing their property – will improve the ability of property owners to help police MPAC's performance in gathering relevant data. (**recommendation 5**)

A Superiority Complex and Clash of Cultures

81 Some within MPAC are rigidly committed to its mass appraisal models. They apparently do not like when its results are challenged. This is apparent not only from the reaction within MPAC to ARB decisions which I will describe below. It is also evidenced anecdotally.

82 My investigators were told by one customer service manager that property owners intentionally pretend not to understand because that is "the nature of the game … Its property taxes." A senior manager demonstrated his resentment to MPAC's disclosure obligations, suggesting that taxpayers do not need the sales information MPAC relies upon because taxpayers can get it from the Multiple Listing Service. He also said that taxpayers are simply not entitled to press MPAC to find comparables that will support the taxpayer's case. Apparently forgetting that MPAC uses taxpayer money to grease its massive data system, and that it is performing a function inextricably linked to the government's taxation power under government trust, and that MPAC uses its resources to search for comparables that will support its case, this manager suggested that the onus should be put on the taxpayer to do his or her own "cherry picking."

83 To the extent that these kinds of attitudes are prevalent within the institution it is more than unhelpful. Yet as much as some within MPAC dislike when its assessment results are challenged, there are managers who are even less impressed when its results are overturned by the ARB. The fact is that MPAC has a superiority complex – not the invidious kind that suggests it is better than others, but the still disconcerting kind that maintains that its mass appraisal results are better than the ARB's assessment decisions. The heart of MPAC's dismissive attitude about the ARB emerges because of a clash of cultures caused by the apples and oranges approaches each take to determining current value. MPAC believes that its mass appraisal system is accurate and has been proved to be so through performance indicators. It also treats "equality" as a crucial if not the crucial animating principle in a fair assessment system. It uses its mass appraisal system as the measure of that equality. When the ARB unsettles a particular assessment achieved using the model MPAC therefore sees this as unfair to taxpayers who were similarly assessed and who, because they did not appeal, are going to pay more than the appellant is. MPAC has other, more self-serving problems with the ARB overturning its results. It is concerned about the impact

of the revised assessment on MPAC's "performance indicators."[16] In other words, the fear is that ARB decisions skew the overall numbers making MPAC's accuracy rates look worse than they are.

84 Not surprisingly, the ARB culture is different. It does not care about protecting a model. It sees its role as to focus on whether the "current value," assessment is correct, a determination it makes without looking at MPAC's appraisal models. Indeed, in its Cogan case (July 22, 2004) the ARB noted that the issue before it is not whether MPAC's model makes sense but what the current value of the property is based on specific evidence like comparators and relevant sales information. This specific focus makes no direct allowance for equality other than to look at comparators when they are offered to see how other putatively similar properties are being assessed. It is evidently believed within the ARB that if it improves the identification of actual current value for a particular property owner, this is the best way to attain real equality.

85 The most direct manifestation of the cultural clash between MPAC and the ARB is the differences in opinion about the relevance of information about prior sales of the subject property. As the Doe case used to introduce this report illustrates, the ARB often considers evidence of a recent sale to be the best evidence of the current value of a property. MPAC tends not to see it this way. While MPAC relies heavily on overall sales patterns to develop its model, its position on the relevance of specific sales is hinted at in its Guide to Property Assessment in Ontario which records:

> A sale price is only an indication of current value that represents the price a buyer and seller agree to in a particular transaction. Current value is the most probable price a property should bring in a competitive and open market under all conditions of a fair sale.

86 In effect, MPAC is worried that conditions, such as imprudent transactions or non-arms length deals (things like family transfers or mortgage sales) may prevent individual sales from reflecting the real current value. MPAC attempts to create a model that is not tainted by such vagaries by excluding suspicious sales from its data. Since its model is meant to be relatively untainted MPAC tends to consider it to be a superior method of appraisal to focusing on the actual market results in a particular case.

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[16] Correspondence from Mr. Isenburg to Mr. John Wilkinson, MPP, May 30, 2005, more particularly described below.

87 The lack of enthusiasm for ARB decisions in some MPAC circles extends beyond the MPAC's commitment to its equality-achieving model and the different levels of trust between the two institutions in the particular sales achieved for the subject property. There is also the belief within MPAC that ARB's Board Members perform poorly, and are often too solicitous of taxpayers. This attitude is most evident in the disturbing May 2005 letter that MPAC's President wrote to Mr. John Wilkinson, an MPP and Vice-Chair of MPAC's Board of Directors, identifying some of the issues that MPAC has with the ARB. The letter ends with Mr. Isenburg suggesting that the situations he lists "bring into question the judgment and decision-making practices of some of the ARB members in the handing down of their rulings and/or decisions." He called for measures to address these issues, including training for Board members. In the body of the letter, Mr. Isenburg listed a number of things that troubled him. For example, he complained that in his estimate, in 50 per cent of the cases the ARB will give token adjustments of 5 per cent or so, unsupported by the evidence. This complaint about "token or sympathetic" decreases was echoed to us by other MPAC employees we interviewed. Mr. Isenburg was also troubled by his perception that Board members will often forget that the onus is on the taxpayer and probe MPAC staff on behalf of the taxpayer as to how MPAC arrived at its assessment.

88 I am going to address each of the key issues raised in turn – the differences in appraisal methods, the treatment of recent sales, and the undesirable impact of the tension between MPAC and the ARB - but before I do I have to indicate why I found the Isenburg letter troubling. The ARB is meant to be an independent Board charged with carrying out a quasi-judicial function. When MPAC is unhappy with Board decisions it should exercise its right to have the decisions reconsidered, or have them judicially reviewed. Contrary to the suggestion made in the letter, I do not feel that it is in the least improper for a Board member to seek information that the member believes might assist taxpayers. Regardless of who bears the technical onus, the ARB is a regulatory body intended to be informal and accessible. Its processes are designed to be user friendly and to avoid technicality. If a Board member believes that a taxpayer, unseasoned in adjudication, needs help getting information from MPAC then it is incumbent on the Board member to assist. Another cause of discomfort is the reference to the "best interest of the parties." I want to be fair, so I will acknowledge up front that I could be mistaken, but I was left with the impression that a "party of concern" in the mind of the President was MPAC itself. While under the *Municipal Property Corporation Act* MPAC is deemed not to be an "agent of the crown", it is nevertheless, fulfilling an important public mandate, which elevates its responsibility. It is in this respect a public servant. Although technically MPAC is indeed a party, like any body performing a public function in a judicial

proceeding, its sole ambition in representing a case before a tribunal should be to assist in ensuring that an accurate current value assessment is achieved. Assessment litigation should not be about vindicating the expectations of a staff that "takes the preparation and presentation of their evidence seriously," nor should it be about winning the case for MPAC. It is about achieving accurate, equitable results. I hope that I have misunderstood and MPAC is indeed imbued with the positive attitude I describe when it comes to evaluating and answering challenges to its assessments.

89 With that said I will return to the discrete issues - the cultural gap, the relevance of sales, and the fallout of these disparities of vision.

The Cultural Gap

90 There are two material considerations that can be used to determine the correctness of property assessments, (1) equality or "equity," as it is called, and (2) "accuracy." In its extreme form "equity" is illustrated by the position of the Ontario Court of Appeal taken in *Re Campeau Developments Ltd. et al and Regional Assessment Commissioner, Region No. 29 et al (1983)*, 41 O.R. (2d) 39 leave to appeal to SCC denied, September 27, 1983, S.C.C. File No. 17695. There the Court held that:

> It has long been recognized that it is not particularly important that an assessment be individually correct, provided that all properties are assessed at the same proportion of their true value, so that each bears its fare share of the tax burden.

91 The base idea inherent in this passage makes sense. The goals of equitable allocation of the tax burden according to relative market value would be achieved even if a home worth $100,000 was assessed to be worth $1000, provided every other home was also described as being worth only 1 per cent of its true value. What matters on a pure equity view is the relative allocation of taxes, not the number that is used to achieve relative allocation. If the idea is to achieve equitable proportionate tax obligations according to market value, though, it makes infinitely more sense to achieve equality by attempting to identify the actual market value of each property instead of some ratio of it. This is where "accuracy" comes in.

92 According to subsection 19(1), "accuracy" in the context of the *Assessment Act* means the correct "current value or average current value." Section 1 defines "current value" in turn:

> "current value" means, in relation to land, the amount of money the fee simple, if unencumbered, would realize if sold at arm's length by a willing seller to a willing buyer.

93 Relativity is therefore not the test. Real current value is. The *Assessment Act* does not authorize the assessor to achieve equality by assigning wrong, relative values to property. The *Campeau* case was based on a different statute under which the issue was not accuracy of appraisal, but whether the assessment was "inequitable." *Campeau* therefore does not govern.

94 This does not mean that "equity" is irrelevant under the *Assessment Act*. Subsection 44(2) of the *Act* states:

> In determining the value at which any land shall be assessed, reference shall be had to the value at which similar lands in the vicinity are assessed.

95 So both factors are relevant. To a degree the cultural gap between MPAC and the ARB lays in the emphasis each believes these two factors, equity and accuracy, should be given.

96 Many Assessment Review Board decisions indicate that the requirement in subsection 19(1) that the assessment of land be based on its "current value" is paramount to the equity factor. These decisions emphasize that it is the duty of the Board to find the correct current value. What this position has to commend it is that subsection 19(1) does expressly say that assessments "shall be based on current value," and subsection 44(2) speaks of having "reference" to equity to determine "value." This leaves equity as an aid and "value," or "current value," as the goal. The "*Viva* case," *Viva v. Ontario Property Assessment Corp., Region No. 10*, [2001] O.J. No. 273 (Ont. S. Ct. of J.), which I describe in more detail below, is often relied on to support preference for marketplace evidence over values generated through statistical mass evaluation.

97 As Mr. Hummel explained, MPAC believes this approach to be wrong. He said that MPAC considers that accuracy and equity are "two separate and distinct equally important requirements." In my opinion MPAC is mistaken about this.

98 There are at least three problems with MPAC's view in my opinion. First, if any decision that deviates from the results of mass appraisal causes an inequity and ARB decisions are obliged to achieve equality then no appeal should ever succeed unless MPAC input the wrong data in the particular case. This raises the second problem. If MPAC's assignment of relative tax obligations as determined by its mass appraisal is to be the measure of equity then full access to MPAC's

methodology should be furnished, and the issue at the ARB should relate less to specific evidence of "current value" and more to whether MPAC's model produces correct results and whether MPAC has used its model correctly. MPAC cannot object to scrutiny of its methods before the ARB yet at the same time expect fidelity to its general market value allocations. Third and most importantly, as I described when introducing MPAC, on its own assessment its mass appraisal systems allow for margins of error – up to 10 per cent of the value in residential cases and more in commercial. Indeed, because of the margin of error built into its model, MPAC itself considers that a "correction" by the ARB of 7.5 per cent up or down is not a contradiction of its mass appraisal results. This means that, using MPAC's own standards and given the margins for error it accepts for its product, changes by the ARB to an assessment do not create any proven inequity unless they create more than a 15 per cent disparity with what MPAC's system identifies as comparable properties.

99 The fact is that MPAC's mass appraisal system is an imperfect predictive model that eschews, save in exceptional cases, the particularized examination of the subject property being assessed. It is far healthier in my view to consider an ARB appeal as a contextually based check or balance on MPAC's success rather than a challenge to it. The safeguard if MPAC thinks an ARB result is wrong is to challenge that result within the review system. The corporation and the ARB simply cannot continue to work at cross-purposes.

The Significance of Sales

100 Manuel Costa of Ottawa thought he had the foolproof response to the Assessment Notice he received for 2001 and 2002 which claimed the "current value" of his property on the valuation date of June 30, 1999 to be $346,000. Mr. Costa had purchased the home in July 1999 for close to $100,000 less than that. His "perfect evidence" did not impress MPAC. They would meet him a little over half way, but they would not accept the sale price as the market value. In a draft response to Mr. Costa prepared by MPAC staff the following rationale was provided for not using the sale price of the property as its value:

> Although you purchased your home close to the valuation date, that sale does not automatically become your assessment. MPAC is charged with the responsibility of providing market value assessments in order to equitably distribute the municipal property tax base among the various ratepayers. There are a variety of reasons why a particular property may sell lower or higher than neighbouring similar properties.

...

> ... properties should be assessed based on the amount of money a property would sell for on June 30, 1999, not the amount individual properties actually sold for close to June 30, 1999. We all know that some people are better at finding deals, better negotiators, etc. when it comes to the real estate market, and that people sell properties for a variety of reasons. That is why the Ottawa Assessment Office feels that your property would have sold for $280,000 and not the $255,000, which was the price, you were able to negotiate with the vendor under the specific conditions at the time of your purchase.

101 In this preposterously circular act of contortion MPAC used its own model result to contradict the actual price paid for the property by assuming, without any evidence of an improvident sale, that if the sale achieved a different amount than its model predicted then the sale price must have been wrong. Fortunately, for Mr. Costa, the Assessment Review Board saw things differently, finding that indeed the current market value of his property was $255,000.

102 As described above, MPAC staff who reject property owners' requests for reconsideration based on the actual sale price of their properties are not acting independently or without direction. They are actually following corporate policy as reflected in the Guide to Property Assessment in Ontario. MPAC's policy on sales is based directly on the equality cultural perspective I have just outlined. The Director Legislation and Policy Services at MPAC, advised my investigators that when the Assessment Review Board changes an assessment to the sale price, this could create an inequity for other property owners with comparable homes.

103 What appears to be MPAC's general practice is contrary not only to common sense but it is also contrary to the authority in the *Viva* case. The Vivas had purchased their property in March 1997 for $610,000 in an arm's length sale. However, the property had been assessed at $695,000 for the 1998 and 1999 taxation years. The valuation date for these tax years was June 30, 1996. While the Assessment Review Board had reduced the assessed value, it did not reduce it to the actual sale price. The Superior Court approved the reasoning of an older court decision that had found that the "recent free sale of a subject property is generally accepted as the best means of establishing the market value of that property." It commented that if there is good evidence of market value as shown by a recent arm's length sale, the concept of equity and fairness amongst taxpayers would ordinarily be satisfied.

104 MPAC's penchant for preferring its own mass generated market predictions to actual sale prices, without proof that the market failed other than the simple fact of deviation from its model, is troubling enough in its own right. It is also galling for many taxpayers given that MPAC encourages property owners to "test the accuracy of their assessments by simply asking themselves if they could have sold their property at its assessed value on" the valuation date. They are told that "if the answer is yes, the assessment is accurate." Mr. Isenburg offered this litmus test in a press release dated October 16, 2005, and it is found in more permanent form in the brochure that accompanies the Assessment Notices, "Important information about your 2005 Property Assessment Notice." There is a disturbing inconsistency in trying to illustrate the accuracy of assessments by appealing to a homeowner's likely inflated sense of what he can sell his property for but then discounting, when it counts, the results from actual sales.

105 It is my opinion and I will be recommending that when a property assessment is challenged based on actual sale price proximate to the valuation date, MPAC should generally accept the sale price as the best evidence of the proper assessment. **(recommendation 13)** MPAC should deviate from this general rule only if there are concrete, cogent reasons for believing that the particular sale does not reflect actual market value. For instance, MPAC may have evidence that the sale was between related parties or was compelled under a power of sale and therefore does not reflect real market conditions. Or inspection of the property and similar properties sold in the same time frame may demonstrate that the sale price for the property is anomalous. For commercial properties other conditions that can affect sale prices such as the composition of tenants or the nature of lease terms can demonstrate that a sale price does not reflect the current value of the property. Where MPAC does reject an actual sale price as not reflecting the property's current value it should provide the taxpayer with clear reasons why it has done so. This will reconcile MPAC's approach with the *Viva* case and ARB practice. As importantly, it will assuage a great deal of the rancour over MPAC's assessment practices.

The Practical Effect of the Cultural Gap

106 I have observed what I consider to be two distressing effects of the cultural gap between MPAC and the ARB relating to current value assessment. The first is that MPAC does not always respect the ARB decisions; while it is bound to follow them for the tax year appealed it far too often ignores those decisions when assessing property for future tax years. Second, MPAC does not display adequate care in recording the reasons for ARB decisions. In fairness, MPAC does not display adequate care in recording the settlements it reaches itself with taxpayers

after Requests for Reconsideration, but I see this, like the cultural gap I describe, as a reflection of its exaggerated and unhealthy commitment to its mass appraisal model. These two patterns render many hard-earned assessment reductions meaningless for future years, and are significant contributing factors to the "revolving door syndrome" that angers so many taxpayers.

Ignoring ARB Decisions in Future Years

107 The most dramatic illustrations of the revolving door syndrome occur in cases where the same valuation date applied for two taxation years because of the now abandoned practice of doing assessments only every two years or more. We encountered a number of taxpayers who successfully appealed their assessments for the first of those tax years, only to find that MPAC ignored the appeal results for the second tax year. The effect was that the same property was treated as having different values on the same valuation date for different tax year purposes.

108 A startling example involves the commercial property of Nichan Markarian. His story is rich with problems. Mr. Markarian was trying to sell his property. He had a realtor list it for $475,000. It remained listed for more than two years. Mr. Markarian received conditional offers in 2002 and 2003 for $450,000, but each fell through. Yet MPAC assessed the market value of his property for the tax year 2004 at $754,000, a 70.2 per cent increase over the previous tax assessment. Mr. Markarian began to investigate why. He looked for comparable sales, finding that there were none during the relevant period. He tried to find out how MPAC arrived at its figure, which his own market experience so badly contradicted. He came up empty, even after paying $239.68 to get unhelpful information from MPAC's website. He then went to the ARB. The ARB said that Mr. Markarian had the "basic right to know how MPAC arrived at the CVA [current value assessment] for the property." More importantly, it found what Mr. Markarian could not - that a comparable property had been assessed by MPAC using an "income approach" whereas Mr. Markarian's was assessed using a different method – the sales comparison approach involving multiple regression analysis. This caused the Board to reject the usefulness of MPAC's evidence, which it found confusing. The Board also learned that a property across the street from Mr. Markarian's was assessed at $9,000 less than his, even though it was on a site that was twice as large, and the building was 35 per cent bigger. The Board accepted Mr. Markarian's evidence about his real market experience and set the assessment at $450,000. Amazingly, when Mr. Markarian received his 2005 assessment, it was back up to the $754,000 that the Board had rejected for the year 2004, even though the 2004 and 2005 tax years were supposed to involve the

same valuation date. Worse yet, by the time Mr. Markarian realized that his revised assessment was not going to be applied to his 2005 taxes the ARB appeal period had lapsed. Then MPAC refused his request for reconsideration. MPAC backed down only after Mr. Markarian complained to my Office and we intervened.

109 William and Maureen Chapman had a similar experience. Their 2004 ARB victory was not accounted for when their 2005 tax assessment arrived. While MPAC agreed to reduce the amount on a Request for Reconsideration, the customer service manager was candid. He warned that MPAC did not agree with the Board's decision and their assessment would likely jump dramatically the next time.

110 The fact is that legally, MPAC is rarely "fully" bound by ARB decisions about the "current value" of the property. While MPAC must abide by the decision for the tax year that was appealed, since each tax year assessment is considered a new assessment the base legal position is that MPAC is permitted to reconsider things anew. There is a legal doctrine called "issue estoppel" that in some cases prevents MPAC from ignoring prior Board decisions. Issue estoppel is a discretionary doctrine that applies to material or central issues that were litigated between the same parties and finally decided after a full hearing. It is "hit and miss" as to whether it applies and it requires litigation to achieve. It is important to remember, however, that my investigation is not just about law. It is also about fairness. A number of courts have recognized what common sense suggests. As the Court said in *Re City of Oshawa and Loblaws Groceries Co. Ltd. et al*, [1963] 1 O.R. 605 in an oft quoted passage, even if the assessor is not technically bound by an appeal decision:

> the practice of assessors making the same assessment in defiance of the judgment … on appeal… when there has been no change in the circumstances is a pernicious one and ought to be stopped.

111 It is painfully obvious to me that, whether technically permissible or not, once the ARB has made a determination on value with respect to property at a particular valuation date, MPAC's failure to apply that decision to future years which apply the same valuation date, when there is no new information, is contrary to basic standards of justice. I will be recommending that MPAC apply ARB findings of value at specific valuation dates when carrying out assessments for future years based on the same date. (**recommendation 14**)

112 The current scheme in which there will be new valuation dates each and every year will likely end this practice but the underlying point in the City of Oshawa case goes even further. It applies to any prior judicially won reassessment, even if that appeal involved a different valuation day. Quite simply, unless there is a material change in circumstance, it remains pernicious and unfair for MPAC to ignore an ARB decision and return to an assessment process the Board has determined to be inaccurate. Yet MPAC does this often. It happened to Mr. Costa, whom I introduced earlier, along with hundreds of other taxpayers who contacted us. Their ARB victories, like Doe's, were evanescent, evaporating after each year necessitating a frustrating cycle of reassessments and reapplications. In an ARB decision released November 27, 2003 the Board commented on how unfair it was that the complainants should be put to the time and effort of re-litigating their 2003 assessment after their successful appeals on their 2001 and 2002 assessment. The Board remarked that:

> "[this] practice of assessing property in defiance of a relevant Board decision by MPAC undermines the purpose of the Assessment Review Board and the taxpayer's fundamental right to have the accuracy of his or her real property assessment reviewed by an independent body."

113 In spite of this, Mr. Hummel defended MPAC's practices by iterating that "every new assessment is a new trial." While he allowed that if there was no new evidence there should be no point in putting the taxpayer through a new trial, he felt that the resistant posture taken by MPAC employees was in fact a good thing because MPAC wants people with strong beliefs who will stand up for what is right rather than easily being bullied and sending the wrong messages. With the greatest respect, this has things entirely backwards. Instead of encouraging an attitude of skepticism about adopting ARB decisions, MPAC should be starting from a presumption those decisions are correct, and it should continue to give those decisions careful consideration when assessing property in future tax years. That consideration should be so careful in fact that unless the basis for the ARB revision was a temporary condition (such as access issues relating to major construction in the area) or unless MPAC has new information about the specific property that makes the ARB decision obsolete, the ARB decision should form the foundation for subsequent assessments from year to year.

114 ARB decisions ought to be respected in subsequent years for at least three reasons:

- MPAC's practice of disregarding ARB decisions without good reason is a challenge to the integrity of that quasi-judicial body, and is unbecoming by an agent carrying out government functions;

- if MPAC feels that the decision is wrong, it should appeal it, not wait it out –doing so and then rolling the results back on the taxpayer has too much of a whiff of "gotcha" to it; and

- there is no way that MPAC, and by association, the municipal property tax system, will ever rehabilitate their battered credibility if taxpayers have to go year after year to the ARB to make the same arguments they won with the year before. This is an expensive, time-consuming and stressful experience. A decision to ignore relevant ARB holdings, even if they are disagreed with, is not only disrespectful of the ARB, it is disrespectful of the taxpayers.

115 I am therefore recommending that MPAC use any ARB reassessment or minutes of settlement reduction as the starting point for the evaluation of a taxpayer's property, even in subsequent years, unless the ARB reassessment or minutes of settlement reduction was based on a demonstrably temporary condition or there has been a material change in the property itself. **(recommendations 15 and 17)** I understand that average increases in the real estate market would of course be considered, but cannot accept that MPAC should simply be free to resort again to its mass appraisal techniques in preference to the discrete contextual decisions made by the ARB.

The Failure to Record

116 MPAC has not been adept at recording relevant information learned during Requests for Reconsideration and ARB appeals, even in cases where it wants to preserve the information for consideration in future assessments. Part of the reason that information has not been entered into the data system is because of "coding problems." A more significant challenge has been the design of MPAC databases. Traditionally, information about assessments has been stored in the Ontario Assessment System data base, an antiquated system linked to the Ministry of Finance, while information about Requests for Reconsideration was stored in the Document Tracking System. There is no direct integration between the two systems, leaving no way to ensure that information about reductions is automatically carried forward. Then there is the practice of not recording the results of settlements achieved after Requests for Reconsideration. MPAC's practice of not recording reductions until they are firmly agreed to by the delivery of signed minutes of settlement is appropriate, but the problem emerges because there is no requirement that those minutes of settlement contain an explanation of

the reasons for the reduction. This virtually guarantees in many cases that a reduction will be a "one time thing." In the case of ARB decisions MPAC employees do not always know why a reduction has been ordered, so nothing gets recorded. Then there is the inevitability of human error or failure. Even though a notepad on the Ontario Assessment System enables staff to record changes that have occurred through Requests for Reconsideration or ARB appeals, that information is not always placed on the system.

117 Failing to preserve relevant information has a financial cost to it. If requests and appeals are being needlessly repeated because relevant information is not captured, efficiency is undermined and overall costs increase. Then there are the human costs of frustration and time wasted.

118 Eighty year old Walter Rudnicki of Ottawa first challenged his assessment in 2001. MPAC inspected his house to see the structural defects he complained about but it refused his claim. He won a 10 per cent reduction before the ARB, from $377,000 to $344,000 after showing photos of the house. His next assessment was up, this time to $417,000. He asked MPAC to reconsider and MPAC came back out. This inspector agreed and Mr. Rudnicki's assessment was reduced to $395,000. The next two assessments were back up, and then brought back down by MPAC after the same case was made. In October Mr. Rudnicki's frustration had grown to the point where he wrote the Premier.

119 The home of Andrew Notaran of Toronto is 150 feet from a busy thoroughfare, across from a low-income housing complex and near another. He has had to raise these facts with MPAC every year, and every time he does he gets a reduction. It is a tiring and exasperating experience for all concerned.

120 Robert and Sheila Kosowan, a fixed-income retired couple, are facing a $4,000 annual property tax bill on their 72-acre bush lot on the Magnetawan River. Their problems began when the Kosowans' 2003 assessment – applicable to 2004 and 2005 - increased close to 40 per cent to $171,000. It seems the Kosowans had been assessed at a very high prime lakefront rate yet the Kosowans learned that their neighbours had been assessed at rates substantially below theirs. Mr. Kosowan advised MPAC that, unlike his neighbours' land, his could not be developed because of rock ridges running through it. Most of his river frontage was designated flood plain, and about half of it bordered on beaver swamp. The Kosowans' request for reconsideration was successful, and the value was reduced to $138,000. His next assessment, the current one, has more than doubled to $308,000. What happened to MPAC's earlier recognition of the negative multiple regression problems with his property? The Kosowans are worried that they will

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lose their retirement home, as they prepare to go through the revolving door yet again.

121 MPAC has known for some time that its failure to capture relevant information is a problem. In May of 2003 the Director of Customer Service, e-mailed MPAC staff acknowledging that "one of the big criticisms we get from our stakeholders (property owners, politicians, etc) is our inability to ensure changes made through appeals get carried forward to the next year (where appropriate)." He reminded staff there is a system in place and asked for assistance because of the high profile the issue has. A year and a half later, in October 2004, MPAC created the Year End Process Improvement Committee, one of the tasks of which was to review the process of "continuation of reductions granted through RfRs [Requests for Reconsideration] and appeals to future assessments." The Committee identified 19,583 cases where reductions achieved through the reconsideration process were mismatched between the Ontario Assessment System and the Document Tracking System. Most mismatches involved the failure of the assessment data base to record Request for Reconsideration adjustments. A Customer Service Manager in Toronto advised that of the 3100 mismatches she reviewed the majority were the result of Minutes of Settlement not having been returned. She noted that other reasons for mismatches included improper coding and keying errors. On July 6, 2005, three weeks after our Office notified MPAC that we were considering this issue, an internal Memorandum was sent to MPAC managers advising them to "ensure that, where appropriate, assessment and/or classification changes resulting from RfRs and Appeals are properly reflected." On October 13, 2005 Mr. Isenburg sent a memo to staff concerning the media reports our investigation had generated. The same day, Rosalie Penny, Vice President of Customer Relations sent a memo to senior executives advising them to begin a review of these processes that should include an audit that Quality Service had previously agreed to do. The review and audit would look into the tracking systems, the legislation and how it impacts on the carry forward question, and the customer perspective. Appropriately, she also directed staff to develop policies to reflect MPAC's "customer-focused culture." Within days, 70,601 properties were identified that had involved two or more ARB appeals and/or Requests for Reconsideration. On October 26, 2005 MPAC managers received another memo on the subject advising them "it is now necessary to confirm that all changes have been carried forward for 2006" and managers were instructed to ensure, where appropriate, that all updates were made to the Ontario Assessment System before the amended assessment notices were released. A December 5, 2005 status report illustrates the depth of the problem MPAC was now striving mightily to correct. It noted 5,078 changes that had been made as a result of the review – 5,078 Rudnickis, Notarans, and Kosowans.

122 It would be unfair to suggest that MPAC had been doing nothing about this problem before the investigation. There were the periodic memos referred to. There was the 2004 Year End Process Improvement Committee, with its progress reports and plans for change. Significantly, MPAC was also in the process of moving to a new Integrated Property System whose more user friendly format is meant to make it easier to input data. Clearly though, things had not taken on a deep sense of urgency until the investigation; in contrast to the current spate of memos, when I examined the protocols and practice documents that have been prepared for employees I found no clear references to the importance of entering the reasons for assessment reductions. I therefore have several recommendations that I believe will assist MPAC in carrying forward on the laudable initiatives it is now making.

123 First, MPAC's own information gap has to be corrected. I am going to recommend that MPAC ensure that all of the minutes of settlement it enters into relating to assessment reductions contain reasons that clearly explain why a reduction has been agreed to. **(recommendation 16)** For the same reason I am going to recommend that if the basis for an ARB assessment decision is not clear to MPAC, that, as it is entitled to, MPAC request reasons for decision from the Board and then record those reasons on the assessment file. **(recommendation 18)**

124 Second, MPAC's own initiatives, taken to date, have to be maintained. I am confident that MPAC will continue to monitor this situation, but to assist in ensuring its success, I am recommending that each Notice of Assessment furnished to property owners contain a box recording the previous years where Request for Reconsideration settlements were achieved, or ARB reassessments were won by taxpayers. The box should record "No" if MPAC believes there were none, and the years in question and type of review process used, where MPAC is aware that reassessments have occurred. **(recommendation 4)**

125 This information will not only enable taxpayers to identify whether MPAC's records include reference to the reassessment results, it will be of use to the ARB in future appeals. It may also forestall complaints. In 2006 Mr. Notaran received yet another tax assessment increase after having won previous reductions because of MPAC's perennial failure to record the prior reduction. He assumed that MPAC had failed again. We discovered during our investigation that MPAC had in fact taken into account a 10 per cent market reduction related to the adverse market influences Mr. Notaran had established. Had his Notice of Assessment recorded that his prior applications had been noted his 2006 sense of aggravation,

which lingered until we were able to get to the bottom of things, may have been avoided.

The Appeal Power Imbalance

126 In litigation, information is power. So, too, is experience, especially when it attains the level of expertise. And in litigation resources are also power – financial resources, data resources, litigation support resources. As every litigator knows, the reality is that cases do not always get decided according to who is right. They get decided according to who persuades a decision-maker that they are right. When it comes to the litigation power balance between MPAC and the typical tax payer before the ARB it is almost invariably no contest. MPAC, a corporation with undoubted expertise in property assessment, with monopoly access to comprehensive land transfer tax sales information, with its massive data-bases and its sophisticated computer systems, with its current ability to keep information confidential because of trade secret protection, with its full-time litigation employees and its multi-million dollar budget, is at an astounding advantage.

127 I see two kinds of issues that emerge from this, specific practice issues relating to the conduct of hearings, and a more general issue relating to who should bear the onus of proof at ARB hearings.

"Trial" Conduct Issues

128 It is a fundamental principle of administrative law that parties are entitled to know the case against them and to have an opportunity to respond. In the case of MPAC, many property owners feel that it not only holds all the cards, but also has an ace up its sleeve. We heard from numerous individuals who had obtained their property comparables from MPAC, spent hours using them to prepare for an Assessment Review Board hearing, only to find at the hearing that MPAC brought forward never-before-seen comparables in support of its assessment.

129 Richard Moll, for example, a statistician from Ottawa, encountered this situation a few years ago. His assessment had increased by 35 per cent and he decided to challenge it. He obtained six comparable properties from MPAC, all which were valued below his assessment of $434,000. He marshaled his arguments and prepared for the hearing. However, at the hearing MPAC produced six different comparables from the ones he had received, all supporting MPAC's assessment.

All his hard work and preparation went out the window as he tried to grapple with this new information. He recalls that MPAC "made me look like a complete idiot." He left the hearing with an overwhelming impression that the process was not fair.

130 Technically, there is no rigid legal prohibition on this practice, although the ARB will, from time to time, protect the taxpayer by exercising its discretion to run a fair hearing by granting adjournments or excluding MPAC evidence. This is not, however, the routine result. The ARB website cautions taxpayers that "MPAC may not necessarily rely on the same comparable properties to defend its valuation as were provided to the complainant."

131 The ARB's occasional readiness to sanction MPAC for producing previously unseen evidence at a hearing inspired MPAC in the past to attempt, albeit without complete success, to eliminate this practice. In August 2003 the Manager, Case Management, Property Values, sent a memo to all staff warning them that MPAC could end up without evidence of comparables if it does not provide adequate disclosure, and encouraging them to exhaust all efforts to ensure that disclosure is made in advance of the hearing. Her memo also reflected an appreciation that it was not only unwise for MPAC to risk sanction by the Board, but that the practice was unfair. We continue to receive complaints about this practice, which Mr. Hummel also understands to be unfair. In his view at least two weeks notice should be given, or the assessor should "perhaps suggest an adjournment" to allow the taxpayer sufficient time to review it.

132 In spite of these encouraging indicators, I am not persuaded that MPAC has sufficient sensitivity to the importance of the corporation being scrupulously fair in the conduct of ARB hearings. As I indicated earlier, based on the President's letter to Mr. Wilkinson, MPP and Vice-Chair of the Board of Directors of MPAC, I was left with the impression that MPAC sees itself as an equal party at ARB hearings. I gained this same impression when I reviewed an interview Mr. Hummel gave during our investigation. When he was agreeing to the unfairness of late disclosure he felt the need to qualify his position by noting that MPAC is caught off guard too and observing that "whatever we say for the tax payer is okay, it isn't the reverse." He did say "we don't mind" but in context I was left wondering how deeply institutionalized that belief really is.

133 There are two reasons why this ethos should be institutionalized if it is not already accepted. First, there is the gross power imbalance I have already described. This not only makes it important for MPAC to go out of its way to be fair, it also makes it appropriate for the ARB to be more exacting when dealing with MPAC than it is when making demands on taxpayers. As one longstanding ARB

member acknowledged, members do try to assist private citizens when they know "the fight is not equal." The second reason why MPAC should be scrupulously fair is that MPAC's power comes from the people of Ontario. Quite simply, MPAC is carrying out a public function. The corporation is in important respects a civil servant, not an independent, entrepreneurial agent. The information it gathers is not for its own purposes; it is gathered for the people of Ontario, one of whom is the appellant at the relevant appeal. The property assessment done is done for the people of Ontario, one of whom is the appellant at the relevant appeal. This has to tincture or modify the adversarial context in which ARB litigation is conducted.

134 What does this mean for disclosure? Mr. Hummel's suggestion of an adjournment offer where disclosure is either late or not forthcoming may be the appropriate solution in some cases, but only rarely so; not only are adjournments inconvenient for litigants and the ARB but non-disclosure adjournments are almost entirely preventable. The solution is to ensure earlier careful preparation. I can see no excuse, for example, for MPAC wanting to use new information in those appeal cases that are conducted after MPAC has already rejected Requests for Reconsideration; quite simply, no request should be disposed of without full relevant information.

135 Even where there has been no Request for Reconsideration there may have been disclosure by MPAC of the 24 comparables that it allows, including MPAC's 6 chosen examples. I recall Mr. Isenburg's observation made in his letter of November 30, 2005 to a taxpayer's association that MPAC has chosen the number 24 for free comparables because 24 is enough to determine current market value. If 24 properties is indeed enough it raises the question of why MPAC feels the need in some cases to supplement its evidence at all, let alone at the last minute. It seems clear to me that if adequate care is exercised when MPAC chooses its 6 examples to identify the examples that best illustrate a fair comparison in MPAC's view, there should be no need to research the issue again. If MPAC feels that its 6 are not enough, then instead of disclosing 24 comparators at the outset, it can disclose more, including all of those it will want during any subsequent hearing. This would have three salutary results. First, it would discourage appeals. Mr. Moll, whose case was lost on new evidence shown for the first time at the ARB, may well have seen the light if he had been given an early look at the evidence that was powerful enough to make him "look like a complete idiot." Second, early complete preparation would encourage early settlement. A number of complainants we heard from were upset even though MPAC settled their claims, because MPAC did it at the "court house door." Third, it would simply be fairer than late disclosure. We heard more than one complaint from taxpayers about "cherry picking" by MPAC. Think about how it

looks to taxpayers when MPAC, with its multi-million property data system, comes in with previously unseen, carefully selected cases late in the day, chosen for litigation purposes. Anyone in that position would be wondering how many comparables favourable to their case would have been passed over while the tactical selection undertaken for litigation purposes was underway?

136 I understand that late discovery of important evidence is not always avoidable, and I appreciate that non-disclosure errors do occur. I will not, therefore, recommend that MPAC can never go beyond its original disclosure of comparables, but I will recommend that it cease the practice of bringing new property comparables to Assessment Review Board hearings without sufficient prior disclosure. (**recommendation 19**) I would also recommend that MPAC give directions to its staff to ensure that challenges to assessments are seriously considered and resolved at the earliest opportunity so that last minute settlements can be minimized. (**recommendation 20**) Finally, I would simply ask MPAC to consider that its reputation for fairness and objectivity will invariably be tarnished if it acts like a litigator trying to win, rather than as a civil servant performing the necessary role of trying to do the right thing.

The Onus of Proof

137 Currently, the onus of proof is on the taxpayer during an ARB appeal. This means two things. First, it means that the taxpayer has to have evidence to prove his claim that the current value assessment is probably incorrect. Second, if the ARB cannot make up its mind, the benefit of the doubt has to be given to MPAC: if it is a 50:50 case, the taxpayer loses and MPAC wins.

138 The principle that the onus is on the taxpayer when challenging an assessment is one of long-standing and it doubtlessly represents the law here. In *Yonge Street Hotels Inc. v Municipal Assessment Corp., Region No. 9* [2004] O.J. No. 2860, [2005] O.J. No. 1741, the Ontario Court of Appeal said that the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment. The word "demolish" is uncharacteristically melodramatic language for a Court, and was taken from an old case. It is a potentially misleading term since the law is clear that a taxpayer need only show that the assessment is probably wrong.

139 There is a complex array of considerations that influence where the law will assign the onus of proof. If a party is making an allegation that another has done wrong, such as in a civil suit, the party making the allegation should prove it. If the state is trying to punish, it bears the onus of proof because if successful, its

acts will harm a citizen. The law will also assign burdens occasionally where a party is trying to challenge a fact that seems so probably true that it should be presumed true until proven otherwise. Similarly, the law imposes burdens in real appeal cases because a lower body has already decided for the respondent, suggesting that the respondent is likely right. The law often assigns burdens so they will fall on the party having the means of proof. This is why in the case of a Charter challenge to a warrantless search the Crown has to prove that the police had reasonable grounds, as only the police know what they were thinking. And at times, burdens are assigned for reasons of administrative convenience, such as in the case of minor offences where the accused may have to show that he was not negligent.

140 If one looks at these kinds of factors, imposing the burden on taxpayers in a property assessment milieu makes little sense.

141 First, a taxpayer who appeals an assessment is not making an allegation of wrongdoing against MPAC as in a civil suit; it is just claiming that MPAC's assessment system failed.

142 Second, the criminal analogy would not put the burden on the taxpayer. The state agent is MPAC, and while taxing is not punishing, for centuries the law drew parallels between taxing statutes and criminal legislation because each process involves state decisions adverse to the personal interest of the individual. On that basis one would think that the onus would lean towards the state agent, in this case MPAC.

143 Nor can the onus on the taxpayer be justified for a third reason, namely, the assumption that MPAC's assessments are so likely to be accurate that they should be presumed to be true until shown otherwise. The reality is that while MPAC does have expertise in the appraisal service, it is in the guesstimate business. It has built large margins of error into its self-evaluation practices because it knows it can be wrong by 10 per cent or 15 per cent, even when things are working well. And things may not be working so well. We simply uncovered too much inaccuracy in the subject property information to have faith that it is working in individual cases, not to mention the admissions in MPAC materials about possible boundary errors and market adjustment challenges because of the diversity of the province. If the degree of inherent accuracy is a consideration, it supports MPAC having to justify its assessments, not a burden that would make the taxpayer disprove them.

144 The fourth consideration that the law imposes burdens in real appeal cases because a lower body has already decided for the respondent, suggesting that the respondent is likely right, does not apply. An ARB appeal is not really an appeal at all, since it is the first judicial hearing. It is in fact a trial de novo. When a taxpayer goes to the ARB, no one has yet decided MPAC is right; only MPAC has.

145 It is when it comes to the fifth consideration, access to information, that the decision to impose the onus on the taxpayer instead of MPAC looks particularly strange. This is not a case like personal income tax where it is only the taxpayer who is aware of income earned and deductible expenses actually incurred, or where paper trails can be covered up. It is true that the taxpayer knows best about the characteristics of their property, but that information is not generally inaccessible to MPAC; property tax assessments depend on limited information from taxpayers relating to their permanent, visible assets, much of which is publicly registered, and MPAC's access to information is aided by rights of inspection without warrant.[17] The key point, though, is that the heart and soul of the assessment process is the mysterious, intimidating mass of information available only to the assessor – information that in a real sense belongs to the taxpayer who has subsidized its collection through his or her taxes. It is a morass of data that the taxpayer's litigation adversary, MPAC, can access in its entirety, but which the taxpayer can get at only in small measure, assuming its litigation adversary, MPAC, makes proper disclosure. As for access to "extra-disclosure" information that might assist on appeals, the taxpayer is invited to go to municipalities to rummage through mounds of assessment rolls manually while the taxpayer's litigation adversary, MPAC, has the full set of information, again acquired at taxpayers' expense, which MPAC can access in nanoseconds on a computer system the taxpayers helped pay for. Whereas the taxpayer can dust off land registration books or sit in front of a terminal at a land registration office reading microfiche or doing computer searches of a kind the taxpayer is unlikely to have expertise in, the taxpayer's litigation adversary, MPAC, has the full bank of relevant data, provided by the taxpayer's province under a monopoly sub-licence, and the litigation adversary, MPAC, has trained employees largely paid for by the taxpayer to secure that data. While the taxpayer can hire real estate appraisers for more than the cost that he or she is ever likely to recover in challenging the assessment, the taxpayer's litigation adversary, MPAC, has a staff of experts paid for from money furnished by the taxpayer. When it comes to

[17] As will be seen when I discuss the Manitoba model below, to the extent MPAC does depend on taxpayers for property descriptions, the burden can still be put on the assessment body subject to modification as required.

relative access to information between litigants, it is not a match-up. This is a slaughter.

146 How then can imposing the burden on the taxpayer be justified? My view is that it cannot be justified, but that justification can be attempted in only two possible ways - historically through a false analogy to the income tax model, or administratively. I need say nothing more about the first way. The reality is that putting the burden on the taxpayer is a matter of administrative convenience. It is believed to discourage appeals.

147 When one thinks about it from the perspective of fairness, this is not a very compelling reason for putting the burden on the taxpayer. To the extent it might work, discouraging appeals by putting a challenging burden on a taxpayer is an indiscriminate form of discouragement, for in the mysterious, expert world of property assessment it is as apt to discourage meritorious appeals as unmeritorious ones. There is little to be said for a process that saves money and energy by maintaining wrong results.

148 The key thing, though, is that the administrative benefits of being unfair in this way may be exaggerated. The Province of Manitoba puts the onus on the assessor, and its system has not broken down, nor has it caused a glut of appeals. My investigators have learned that outside of Winnipeg, there were 2500 notices of appeal to the Board of Revisions for the 400,000 properties in Manitoba, a 0.6 per cent rate, lower than the apparent rate of appeals here, which based on 2004 statistics seems to be around 1 per cent. In Winnipeg there were 4500 appeals for 200,000 properties (of which approximately 1/3 were commercial appeals), a rate of 2.25 per cent. This is a higher rate of appeals than appear to occur here, and this higher rate may well be due to the absence of onus – the taxpayer has nothing to lose by appealing. I would nonetheless make three observations. First, the numbers in Winnipeg have not crushed their system. All indications we have is that it functions well. Second, the rate of 2.25 per cent is in fact comparable to the combined number of formal Requests for Reconsideration and Appeals here. If we were to require all taxpayers to attempt a Request for Reconsideration first, the number of appeals would no doubt be reduced. Third and most importantly, while making this move could increase the number of ARB hearings, it would improve their fairness, and likely the assessment process itself.

149 *The Municipal Assessment Act*, the Manitoba statute that places the onus on the assessor, is not insensitive to the issues raised. The approach taken is a pragmatic one, recognizing that on issues of exemption from tax or classification the burden of proof should be on the taxpayer who is most aware of the use made of the property. It also provides that if a property owner resists inspection or disclosure,

the burden should shift back to the property owner. Specifically, section 53 of Manitoba's Act provides:

> Burden of proof on assessor
>
> 53(1) Subject to subsections (2) and (3), a board shall, at a hearing of an application that pertains to the amount of an assessed value, place the burden of proof on the assessor on matters at issue with respect to the amount of the assessed value.
>
> Burden of proof on applicant
>
> 53(2) A board shall, at a hearing of an application that pertains to liability to taxation or the classification of property, place the burden of proof on the applicant on matters at issue with respect to liability to taxation or classification of property.
>
> Burden of proof for non-cooperation
>
> 53(3) Where an applicant fails or refuses
>
> (a) to give an assessor a reasonable opportunity to inspect the property; or
>
> (b) to comply with a request for information and documentation under section 16;
>
> a board shall, at the hearing of the application, place the burden of proof on the applicant on all matters at issue.

150 This process is also administered pragmatically. Even though the onus is on the assessor, the form requesting an appeal requires the taxpayer to set out reasons. This no doubt helps focus the issues. As might be expected, according to interviews we conducted, the experience in Manitoba is that taxpayers do present a case because it is in their interests to try to do so.

151 In my view, Manitoba's approach, although unique in Canada, is an enlightened one. Manitoba has liberated itself from the false analogy to income tax and reflected an appreciation of the dynamics and realities of assessment. The beauty is that the party that made the original call is called upon to use its deep reservoir of information and expertise to justify it. By contrast, in Ontario the scales of

justice are tilted in favour of MPAC. This may be why, it is alleged by MPAC, that the ARB sees fit to give token adjustments to taxpayers without good reason. If the onus is placed on MPAC and it presents a compelling case, this may be less likely to happen.

152 Even though it is apt to result in an increase in the number of formal appeals, it is my opinion that nothing short of a reversal of onus in Assessment Review Board proceedings will achieve true equity and level the playing field for Ontario's citizens. Reversal of the onus in assessment matters would promote the value of transparency, and serve to lessen the impact of the current restrictions on information disclosure. For that reason I am recommending that Ontario join Manitoba. **(recommendation 21)**

Conclusions

153 MPAC is a non-profit corporation that carries on a public function that has direct, personal costs for Ontario property owners. While it does not tax, it has been given a monopoly on the power to assess properties and thereby establish relative rates of taxation. It does this primarily with tax money paid by the people of Ontario, remitted to MPAC by municipalities under contracts of service the municipalities are obliged to enter. A small percentage of MPAC's budget is earned entrepreneurially but it is earned using infrastructure paid for by Ontario taxpayers and a monopoly on otherwise public information that it shares under a sub-licence with Teranet Inc. This Corporation is not an entrepreneurial enterprise. It is a public servant.

154 In spite of the many criticisms I have made in this Report, I gained the strong impression during this investigation that MPAC is a good corporate citizen and that its principals are well-intentioned and committed. My job as Ombudsman, however, is to address systemic problems in an effort to improve the functioning of government, and there is much room for improvement in the case of MPAC. I am aware that citizens will never be enamoured with any agency that plays such an intimate role in the collection of taxes, but the demonstrated fact, learned from our investigation, is that the manner in which MPAC has been operating has caused unnecessary challenges and difficulties for Ontario residents. As a result, MPAC is suffering from a credibility crisis, which reflects badly on the Government of Ontario whose municipalities must use MPAC's services to collect taxes. Many of the taxpayers whose money MPAC is trying to guard are not happy, with reason, and many of the problems that have caused this discontent can be fixed. That is why I am making the recommendations I am.

155 The first cast of problems I identified in this report have to do with MPAC's monopoly of information. I can only reiterate that MPAC's information must be treated as the taxpayers' information, even if it is technically owned by MPAC. That information is derived from public registrations and gathered by self-reporting obligations imposed by law. More importantly, the information is collected by MPAC, not for its own enrichment, but in the public interest. It is this perspective that animates my reaction to what I found. For the information which MPAC is prepared to share - including the information about the specific property being assessed, the 24 comparables, the limited array of information about the computerized multiple regression analysis systems, and the additional information that can be purchased - MPAC has simply not made access easy enough. I am therefore making recommendations to improve access to information. Moreover, I lament that MPAC's entrepreneurial vision has caused it to hold-back its intellectual property; the net effect of doing so is that taxpayers do not see the corporation as operating in an open, transparent way. MPAC has unwittingly chosen to trade its own credibility for confidentiality by protecting aspects of its evaluation process. The public remains suspicious, and I fear that this suspicion will abate only if MPAC changes its priorities. I appreciate that this raises significant public policy issues that require study and consideration, so I am recommending that dedicated consideration be given to this, with public input. **(recommendation 8)** At the very least, whether this changes or not, the Proposals for the Release of MRA Related Data it has developed for improving access to information should be implemented. (recommendation 7)

156 Finally on the question of access to information, I found that MPAC has simply made it too hard for citizens to get to people in the know. The walls it has constructed to protect field agents may have been built with efficiency in mind, but they are driving many Ontarians to distraction and simply must come down. **(recommendation 10)**

157 MPAC is fully aware that, in its own words, "accurate assessments are the cornerstone of the property tax system." It collects and collates mountains of information to try to achieve this. In spite of this, my examination shows that MPAC has not succeeded systematically enough in achieving accurate assessments. I acknowledge that MPAC works hard on quality control and self-evaluation and that its internal performance indicators stand up well, allowing for their own margin for error. Still, I was simply shocked to encounter as many errors as I did and many of those we met in this investigation were angered by it. No one expects perfection as mistakes will get made but I did not get an impression of an appropriate sense of urgency within MPAC from reviewing our investigation materials. There is little I can do about this other than to implore

MPAC to strive to do better and to develop more consistent criteria for reporting on errors across field offices. I am also hopeful that by making it clearer to taxpayers what information MPAC has about their property, taxpayers will become more adept at discovering some of the inspection errors that MPAC has made.

158 Among the more disturbing problems we encountered in this investigation is MPAC's sense of the superiority of its mass appraisal techniques over the more specific, contextual evaluations conducted by the ARB. Expressed as a difference of philosophy about the importance of equality or equity, at bottom this is a disagreement about method. Frankly, MPAC's legal position strikes me as wrong; the way the *Assessment Act* strives to achieve equality is to require accurate determinations of current value, not to resist any adjustment that might seem discordant with MPAC's mass appraisal results. While MPAC's mass appraisal techniques are dedicated to accurate market value assessments, like all appraisal methods they are imperfect and so too is the relativity they establish. For better or worse the Province of Ontario has established a superior body to adjudge the correctness of MPAC's products. It is far healthier for MPAC to consider the ARB as a check or balance on its best efforts, and to use judicial avenues to protest decisions it disagrees with. MPAC will simply not gain credibility for the tax system so long as it ignores relevant ARB decisions, even where it is not legally bound by them. Nor will it gain credibility so long as it resists using actual sales information for specific properties to direct its appraisals; it is true that the market can fail, but mass appraisal is not precise enough to judge whether that has happened on its own, and the public will never understand or accept a result that disregards actual experience. I am therefore recommending that unless MPAC has concrete, cogent reasons for believing that a sale has not been made under market conditions or does not otherwise reflect market value, that MPAC should accept that sale price as the best evidence of the proper assessment. (**recommendation 13**) If MPAC rejects the actual sale price, it should provide clear reasons to the taxpayer for doing so. I am also recommending that it apply strictly ARB decisions on current value for tax years having the same valuation date, and that it use ARB decisions on current value as the starting point for its evaluation even for tax years with different valuation dates unless the basis for the ARB's decision was a temporary condition or MPAC has concrete information that circumstances have changed. (**recommendations 14 and 15**)

159 I have also discovered that MPAC has simply not been careful enough about recording information that might benefit the taxpayer. It must do better at identifying the underlying basis for adjustments to improve. Its own minutes of settlement must record the reasons for reductions, and where the basis for an ARB

decision is unclear, reasons should be requested. (**recommendations 16 and 18**) Ignorance is no excuse for not preserving information. Moreover, MPAC has to do better in recording information. I am heartened by recent efforts. Those efforts can be supported if MPAC empowers taxpayers to police MPAC's practices by recording on Assessment Notices whether there have been prior revisions as the result of Requests for Reconsideration or ARB appeals.

160 Finally, I perceive a deep power imbalance before the ARB that affects the overall fairness of the processes, and the public confidence in them. First, MPAC has to attempt to ensure that full disclosure is made as early as possible, in the interests of both fairness and efficiency. It should get its research done early so that it can induce settlements, and work consistently in evaluating claims and appeals. (**recommendations 19 and 20**) Second, the onus of proof at ARB hearings should be altered. (**recommendation 21**) When one stands back and analyses it, the wisdom of the Manitoba model commends itself and I highly recommend that it be adopted here.

161 I have attempted in this Report to be both specific and respectful of the limits of my mandate. The experience of thousands of Ontarians is that property assessment in this province is arbitrary and indefensible. Many have called for a complete overhaul of the current system, something that is certainly beyond my province and expertise to make recommendations about. Still, these people came forward and their voices deserve to be heard. It is important to capture some of the significant concerns expressed by individuals and groups we spoke to about MPAC, even though they do not fall squarely within the scope of my investigation. I have done so in Appendix 2 to this Report.

Opinions

162 It is my opinion that the Municipal Property Assessment Corporation has failed to ensure that property owners are provided with sufficient and timely assessment information to enable them to understand and fairly challenge their property assessments. I believe the Corporation's conduct is unreasonable, unjust, oppressive and wrong under subsections 21 (1)(b) and (d) of the *Ombudsman Act*.

163 It is also my opinion that the Municipal Property Assessment Corporation has failed in its responsibility to ensure that its assessment decisions are accurate and fair, and has undermined the integrity of the Assessment Review Board process through its conduct. I believe that the Corporation's practices are unreasonable,

unjust, oppressive and wrong, under subsections 21 (1)(b) and (d) of the *Ombudsman Act*.

164 In addition, I believe that MPAC's current practices relating to the onus in assessment matters are based on a practice or rule of law that is unreasonable, unjust and oppressive under subsection 21 (1)(b) of the *Ombudsman Act*.

Recommendations

165 I am making the following recommendations addressed at increasing transparency in the property assessment system and restoring integrity and efficiency to decision-making at the Municipal Property Assessment Corporation:

1. That the Municipal Property Assessment Corporation should amend the Brochure that accompanies its Notice of Assessment to describe the importance to taxpayers of ensuring that the Municipal Property Assessment Corporation has accurate information about the taxpayer's property, and describing alternative means for learning about *all* of the information the Municipal Property Assessment Corporation has relating to the subject property.

   s. 21(3)(g) *Ombudsman Act*

2. That the Municipal Property Assessment Corporation should amend the Notice of Assessment to describe, for cases where "multiple regression analysis" techniques have been used, not only the average municipal assessment increase or decrease but also the average percentage change within the particular neighbourhood zone the property falls within.

   s. 21(3)(g) *Ombudsman Act*

3. That the Municipal Property Assessment Corporation should amend the Brochure that accompanies its Notice of Assessment to describe how information about comparable properties can be useful on appeal, furnish accurate and complete information as to exactly how many comparables can be secured and how these comparables can be accessed, making particular note that the six comparables the Municipal Property Assessment Corporation selects are likely to be relied upon by the Municipal Property Assessment Corporation in the event of an appeal to the Assessment Review Board.

   s. 21(3)(g) *Ombudsman Act*

4. That the Municipal Property Assessment Corporation should include a box on the Notice of Assessment provided to property owners recording the previous years where Requests for Reconsideration settlements or Assessment Review Board reassessments were achieved. The box should record "No" if the Municipal Property Assessment Corporation believes there are none, and the years in question and type of review process used, where the Municipal Property Assessment Corporation is aware that reassessments have occurred.

   s. 21(3)(g) *Ombudsman Act*

5. That the Municipal Property Assessment Corporation provide a copy of the Property Profile Report relating to the property when it sends out its property assessment notices.

   s. 21(3)(g) *Ombudsman Act*

6. That the Municipal Property Assessment Corporation, in providing information about comparables, should include all information about those properties that may be relevant to the evaluation of the property.

   s. 21(3)(g) *Ombudsman Act*

7. That the Municipal Property Assessment Corporation implement the changes in its Proposal for Release of MRA Related Data, dated November 17, 2005.

   s. 21(3)(g) *Ombudsman Act*

8. That the Government of Ontario undertake a review of whether the public interest is better served by permitting the Municipal Property Assessment Corporation to maintain confidentiality over its intellectual products, or by requiring full disclosure of property assessment methodology to Ontario taxpayers.

   s. 21(3)(g) *Ombudsman Act*

9. That the Municipal Property Assessment Corporation ensure that its administrative procedures regarding assessments and inspections, disclosure of information, requests for reconsiderations and Assessment Review Board appeals be set out in writing and made available to the public on its website. These procedures should include those administrative procedures incorporating the recommendations set out in this report.

   s. 21(3)(g) *Ombudsman Act*

10. That the Municipal Property Assessment Corporation review its current Customer Contact Centre practices with a view to ensuring that property owners gain access to those staff who can most appropriately address their enquiries.

    s. 21(3)(g) *Ombudsman Act*

11. That the Municipal Property Assessment Corporation undertake a review of its staffing needs to determine whether staffing strategies can be identified and pursued for improving the accurate collection of property data.

    s. 21(3)(g) *Ombudsman Act*

12. That the Municipal Property Assessment Corporation standardize its inspection audit reports, and provide the Ombudsman with the results of its inspection audits and quality reviews for 2006, as they become available.

    s. 21(3)(g) *Ombudsman Act*

13. That, when a property assessment is challenged based on an actual sale price proximate to the valuation date, the Municipal Property Assessment Corporation should generally accept that sale price as the best evidence of the property assessment. The actual sale price should also be treated as an important factor in assessing the current value of the particular property in future years. MPAC should deviate from these general rules only if there are concrete, cogent reasons for believing that the sale has not been made under market conditions or does not otherwise reflect actual market value.

    s. 21(3)(g) *Ombudsman Act*

14. That the Municipal Property Assessment Corporation should apply Assessment Review Board findings of value at specific valuation dates when carrying out assessments for future years based on the same date.

    s. 21(3)(g) *Ombudsman Act*

15. That the Municipal Property Assessment Corporation should be bound to apply any assessment reductions imposed by the Assessment Review Board to future years' market value assessments of the same property, unless they have been determined to be wrong by a court of law or the Municipal Property Assessment Corporation can clearly demonstrate that the circumstances justifying the assessment reduction have changed. In such case the reasons justifying the change should be set out in the taxpayer's assessment notice.

s. 21(3)(g) *Ombudsman Act*

16. That the Municipal Property Assessment Corporation should ensure that all minutes of settlement it enters into relating to assessment reductions contain reasons clearly explaining why a reduction has been agreed to, and that these reasons are recorded.

    s. 21(3)(g) *Ombudsman Act*

17. That the Municipal Property Assessment Corporation should be bound to apply reductions agreed to in minutes of settlements to future years' assessments of the same property unless the Municipal Property Assessment Corporation can clearly demonstrate that the circumstances justifying the assessment reduction have changed. In such case the reasons justifying the change should be set out in the taxpayer's assessment notice.

    s. 21 (3)(g) *Ombudsman Act*

18. That the Municipal Property Assessment Corporation should request reasons for Assessment Review Board decisions if the basis for an assessment decision is unclear, and record all Assessment Review Board reasons.

    s. 21(3)(g) *Ombudsman Act*

19. That the Municipal Property Assessment Corporation immediately cease the practice of bringing new property comparables to Assessment Review Board hearings without sufficient prior disclosure.

    s. 21(3)(g) *Ombudsman Act*

20. That the Municipal Property Assessment Corporation give direction to its staff to ensure that challenges to assessments are seriously considered and resolved at the earliest opportunity and that last minute settlements before the Assessment Review Board are discouraged.

    s. 21(3)(g) *Ombudsman Act*

21. That the onus in assessment matters be placed on the Municipal Property Assessment Corporation to substantiate its assessments when they are challenged.

    ss. 21(3)(g) *Ombudsman Act*

22. That the Municipal Property Assessment Corporation report back to the Ombudsman's Office in six months time on its progress in implementing the Ombudsman's recommendations.

ss. 21(3)(g) *Ombudsman Act*

RESPONSES

166 At the conclusion of my Office's investigation a preliminary report and recommendations were provided to the Premier, MPAC and the Minister of Finance for review and comment. Members of my Office also met with representatives from MPAC's Board of Directors in addition to MPAC's President, Carl Isenberg and Vice President, Property Values, Larry Hummel.

167 MPAC provided a detailed and considered response to the majority of my Office's recommendations.

MPAC's RESPONSE

168 MPAC provided a comprehensive response to my preliminary report. It has accepted and agreed to implement 16 out of 20 recommendations that come within its administrative control. It has agreed in principle with recommendations 5, 10 and 11, but indicated that these require further review prior to implementation.

169 MPAC in its initial response did not agree with recommendation 13, as set out in the preliminary report, which would require that it accept the actual property sale price as the value for assessment purposes in certain circumstances. MPAC's position was that this would result in inequities within the system. Further, it claimed that legislative change would be required to implement this recommendation.

170 I disagree with both these points. In its written response to the preliminary report, MPAC does not address or even mention the decision of the Ontario Superior Court of Justice in *Viva*, preferring to push it on to the plate of the provincial government. In its response, the Minister of Finance throws the hot potato back to MPAC, writing that the provincial government is "prepared to support MPAC in its examination of measures … to bring about recommended changes."

171 MPAC's marriage to its mass appraisal model and the obduracy of its ways **amounts to no less** than blatant disregard for the independent review of its decisions by quasi-judicial and indeed judicial bodies. If MPAC did not agree with case law on the interpretation of the *Assessment Act* such as *Viva* or rulings of the ARB, its course of action was not to ignore the law or impugn the Board in internal correspondence but rather to pursue the appropriate legal appeals. Furthermore, recommendation 13 is of such importance that if MPAC ever wants to achieve the level of trust and confidence it seeks to establish with property owners, it will have no choice but to accept the wisdom of ceding to the principle that the sale value should, in the absence of good evidence to demonstrate otherwise, be generally accepted as the best evidence of the proper assessment. I am encouraged by recent discussions with MPAC that it will reconsider its position and move forward on implementing recommendation 13.

172 MPAC's response to the other recommendations that are within their purview to implement is satisfactory.

MINISTER'S RESPONSE

173 Dwight Duncan, the Minister of Finance responded to my Report for the Government of Ontario and on behalf of the Premier. His brief response is included below in its entirety:

> Thank you for the preliminary copy of your report regarding the Municipal Property Assessment Corporation (MPAC).
>
> I would like to acknowledge the work that your team has done in preparing this report.
>
> I believe we all share a common goal of maintaining a property tax system that is transparent and accountable to taxpayers and municipalities. We appreciate receiving suggestions for ongoing improvements to this system.
>
> We have reviewed the report and have taken note of all of the recommendations. With respect to the recommendations that propose improvements to MPAC's processes and procedures, we are prepared to support MPAC in its examination of measures that may be undertaken to bring about the recommended changes.
>
> Thank you again for the opportunity to review a preliminary copy of your report.

174 Some will no doubt react harshly to the Minister of Finance's response and see it as unresponsive and dismissive. First, there is no position taken on any of the recommendations made to the Ontario government. It bears mentioning that given the nature of the issues covered in the report and the scope of it's recommendations, the preliminary report was served on the Premier who wrote that the Government's "response" to our request for comments would come from the Minister of Finance. Second, the letter contains little apart from pleasantries such as an "acknowledgement" of our work, an iteration of a "belief" in sharing a common goal and finally, a word of appreciation to receiving our "suggestions".

175 I understand from dealings between my office and the office of the Minister of Finance that my preliminary report arrived at an inopportune time, during preparations for an upcoming budget which were already underway. As well, from communications between my Office and Ministry Staff, it appears that the Minister of Finance may desire additional time to study and consider the recommendations put forward. The Minister may indeed have further comments in light of MPAC's response to the preliminary report and its recommendations and in particular its position that the acceptance and implementation of key recommendations are outside of its control. I look forward to the Government's response to the Final Report and in particular, as to who should bear the onus in assessment matters. Predictably, MPAC is wary of shifting the onus of proof from the taxpayer to it. I must emphasize that the adoption and implementation of this recommendation is key to MPAC "turning the corner" and rehabilitating itself as a fair minded public servant.

176 Finally, the Minister's response states: "we are *prepared to support MPAC* in its examination of measures that may be undertaken to bring about changes". Indeed, I sense that the public as a whole also remains prepared to support MPAC in its quest for improvement. With MPAC's favorable response to the majority of the recommendations in this report, change is already afoot. I remain hopeful that with the report finalized, the remaining recommendations to MPAC and the Government may be accepted to ensure that substantive and long lasting improvements result.

André Marin
Ombudsman

177 **APPENDIX 1**

	Sample Size	No. of non conformances identified	No. of properties identified with non-conformance	No. of non-conformances affecting value	No. of properties where value affected by a non-conformity
13	70		50	48	26
18, 19, 20	100		78	71	46
6	30		13	13	12
7	40		36	29	22
28, 29, 30	103	82	51		
32	100	9	9		
1, 2, 5	78		22		13
16, 17, 25, 28A	115	62	43		
23	97	143	67	37	
9	108	37	27		
3, 4	110	28	18		
15	110	28			
Total	1061	389	414	198	119

Appendix 2

178 During the course of our investigation, we heard from thousands of individuals, numerous associations, and many municipalities that expressed strong opinions regarding the current state of property assessment in Ontario. However, the focus of my investigation was the administration of the property assessment system by MPAC, not the system itself. As Ombudsman my responsibility is to address government administration, not to substitute my views for the political judgment of legislators. The broader issue of how we tax municipal property is one that we elect Members of Provincial Parliament to decide. It is not the function of the Ombudsman of Ontario to supplant the role of Parliamentarians, who decide the broad-based policy issues. Having said this, I cannot ignore the tidal wave of criticism that was directed at the legislative framework for property assessment in Ontario during this investigation. Accordingly, I am taking this opportunity to set out some of the compelling issues that were raised with our Office.

179 A number of individuals and organizations urged wholesale reform of the market value assessment system. They emphasized the volatility and unpredictability of market value assessments. "Hot" real estate markets result in property owners of modest homes and waterfront properties finding themselves being taxed on substantial unrealized capital gains. This is particularly challenging for those with little ability to pay. A common theme addressed by a multitude of complainants was the immense burden the current system imposes on those on fixed incomes, such as seniors. Some individuals say they may have to sell their homes because of increased taxation. It is not an answer to say to these valued citizens that in their later years, they will just have to adjust, leave the homes they have lived in for decades, and "downsize." It has also been suggested that the Province's 5 per cent cap on reassessment-related increases for businesses results in inequitable distribution among the commercial class with some businesses funding the shortfall that the cap creates, as well as an unfair shift of the tax burden from the business class to the residential class.

180 Some have suggested that one way to stabilize the system would be to introduce a cap on assessment increases, for instance by creating a base year, and limiting future increases to the rate of inflation or to a level that parallels the historic long term Ontario Real Estate price index. For instance, in some jurisdictions properties are reappraised at current fair market value only when there is a change of ownership or upon completion of new construction. Some jurisdictions provide that annual assessments only increase up to a set percentage.

181 Many expressed frustration with the current deadlines for requesting reconsideration and complaining to the Assessment Review Board. Property owners often have to file a complaint to preserve their rights before the Board, before their request for reconsideration has been considered. If they settle before the Board hears the matter, they must then wait sometimes many months before obtaining a refund of their filing fee if they settle with MPAC before an Assessment Review Board hearing. The suggestion was repeatedly made that the process of reconsideration and complaint should be made sequential, and some suggested that the complaint timeline be a floating one. Both MPAC and Assessment Review Board staff have expressed support for this option. This concern may, however, be balanced against the need of municipalities to have sufficient information to quantify their potential tax exposure prior to finalizing budgets and setting tax rates.

182 We also heard from those in the agricultural field who expressed concerns about the current classification and valuation of farm and related land in the Province.

183 It is unlikely that any system for the assessment and taxation of land will ever be praised by those subject to it. While most Ontarians accept the inevitability of taxes, they want assurance that their assessments for tax purposes have been fairly arrived at. There is always room for improvement. It is clear that the current assessment system is far from perfect, and I urge the government to engage in a process of review to consider the many concerns and options available with respect to the property assessment system in Ontario.

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